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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 70

COMMONWEALTH OF PENNSYLVANIA EX REL. JAMES SMITH,

Petitioner,

vs.

STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY AND DR. FREDERICK S. BALDI, SUPERINTENDENT PHILADELPHIA COUNTY PRISON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

MICHAEL VON MOSCHZISKER,
HERBERT S. LEVIN,
THOMAS D. MCBRIDE,
Counsel for petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 818

COMMONWEALTH OF PENNSYLVANIA EX REL. JAMES SMITH,

Petitioner,

vs.

STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY AND DR. FREDERICK S. BALDI, SUPERINTENDENT PHILADELPHIA COUNTY PRISON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of James Smith, respectfully represents:

I. Summary Statement of the Matter Involved

Petitioner is presently under sentence of death imposed by the Court of Oyer and Terminer of Philadelphia County, Pennsylvania, upon his guilty plea of murder and the fixing of the degree thereof as murder of the first degree by the Court. The judgment of sentence was affirmed on appeal

by the Supreme Court of Pennsylvania, on June 24, 1949. *Commonwealth* v. *Smith,* 362 Pa. 222, 66 A. 2d 764. No appeal or petition for certiorari was filed in this Court.

An application for clemency was made to the Pennsylvania Board of Pardons, which was rejected on September 21, 1949. The Governor of the Commonwealth issued his warrant to the Warden of the Western State Penitentiary, fixing the week of September 26, 1949, for the execution of the death sentence. Petitioner's Counsel made a further request for stay of execution so that a petition for certiorari could be filed with this Court. It would appear that the Governor, being informed correctly that the time within which certiorari could be applied for had expired the previous day, denied any further stay on September 23, 1949.

On the evening of September 23, 1949, Petitioner's Counsel by telephone made an oral application for a writ of habeas corpus to Judge Welsh, District Judge of the United States District Court for the Eastern District of Pennsylvania. On that oral application, Judge Welsh directed Petitioner's Counsel to appear in Court at 10 o'clock a. m. on the following day and to give notice to the proper State Prosecuting Officers. The following day Judge Welsh, having postponed the time of hearing the application until 12 o'clock Noon, at the request of an Assistant United States Attorney, who had also been notified to be present, after hearing preliminary statements from both sides, issued the writ of habeas corpus at approximately 12:45 p. m. and stayed the sentence of death, in accordance with 28 U. S. C. A. 2251.

Although Petitioner had been in Philadelphia at the time of the oral application for the writ on the evening of September 23rd, he was removed therefrom at approximately 7:20 on the morning of September 24th and was transported by automobile to the execution building of the Western State Penitentiary some hundreds of miles away. There-

fore, at the time the writ issued, Petitioner was being conveyed in a moving automobile and was apparently beyond the territorial limits of the Eastern District of Pennsylvania. The writ was served upon the Warden of the Western State Penitentiary in the early evening of September 24, 1949, the same day it was issued, and, in obedience thereto, the scheduled execution was stayed and Petitioner was produced before the judges of the Eastern District of Pennsylvania, sitting en banc, on October 4, 1949.

Meanwhile Petitioner's Counsel had supplemented the oral application by a written petition. After legal argument, mainly on jurisdictional questions, the Judges of the District Court directed that testimony be taken on the factual issues, which was done on October 6, 1949. Thereafter, a majority of the Judges of the District Court dismissed the writ on the sole ground that the Court, under the circumstances narrated above, was without territorial jurisdiction. One Judge, in concurring, added that the writ should be dismissed on the further ground that Petitioner had failed to exhaust all "state remedies" and indicated, without discussing the operative facts, that due process had not been denied. One Judge dissented on the ground that the Court did have territorial jurisdiction, the state remedies then available were inadequate and that under the testimony due process had been denied. The Opinions are reported at *United States ex rel. Smith* v. *Warden of Philadelphia County Prison, et al.*, 87 F. Supp. 339.

Thereafter an appeal was taken to the United States Court of Appeals for the Third Circuit and two Judges of the District Court granted a stay of proceedings against Petitioner under the authority of 28 U. S. C. A. 2354.

The Court of Appeals affirmed on the majority opinion of the District Court, which had dismissed Petitioner's application on the sole ground of territorial jurisdiction.

To avoid delay and since it had been seriously contended

by the Commonwealth in the District Court that there was still a "state remedy" available, Counsel for Petitioner had on the 21st day of November, 1949, filed his Petition to the Supreme Court of Pennsylvania, asking for a writ of habeas corpus (R. 4). That Court directed Counsel to appear ex parte and orally state the case made by the Petitioner, which he did on the 22nd day of November, 1949.

Thereafter the Supreme Court of Pennsylvania, on the 23rd day of November, 1949, granted a Rule upon the Commonwealth of Pennsylvania to show cause why the writ of habeas corpus should not be granted (R. 1). This Rule was made returnable December 6, 1949 and directed that Petitioner need not be brought before the Court.

The Commonwealth, acting through the Attorney General on the 2nd day of December, 1949, filed an Answer. On December 6th, 1949, which was the return day of the Rule to show cause, the Attorney General and Counsel for Petitioner appeared at the bar of the Supreme Court. Petitioner was not present. When the case was called Counsel for Petitioner orally notified the Supreme Court that this procedure was improper (R. 55) and filed in writing a preliminary statement of the facts he hoped to prove (R. 55-56), together with a request that testimony as to the issues of fact be heard by a Judge of that Court or a Judge of the Court below (R. 55).

Counsel for Petitioner thereafter filed a brief of law reiterating the same position and insisting that the Court by analogy to the holding of this Court in *Walker* v. *Johnston*, 312 U. S. 275, 61 S. Ct. 574, should dispose of the proceeding by causing testimony to be taken (R. 56-57). The next thing that occurred was that the Supreme Court of Pennsylvania, without having heard any testimony itself or having directed that any testimony be taken by any Pennsylvania judicial tribunal, filed an Opinion, refusing to issue the writ (R. 31, et seq.). In that Opinion it is clear not only

that the Court considered the printed record filed with it on the main appeal, but the Court or opinion writer had also been, in some way still unknown to Petitioner or his Counsel, provided with a copy of the Notes of Testimony taken before the Federal Judges of the Eastern District. The Opinion said that the Court considered that testimony by "agreement" of counsel. (See R. 54). Neither the Record nor the facts support that statement. Counsel for Petitioner then filed a Petition for rehearing on the basis of certain other factual misstatements and asserting that the Court had no right to consider the testimony taken in the Federal Court (R. 54, et seq.). The making of any such agreement was not only specifically denied (R. 54-55) but the statements of Petitioner's briefs, noted above, were reiterated (R. 55-57) with the request that they be made of record "in connection with any further proceedings to be taken thereon" (R. 54). No answer to this petition was filed by the Commonwealth and the factual averments were not denied of record by anybody. The Supreme Court of Pennsylvania then corrected certain minor misstatements of fact and dismissed the Petition for Rehearing. The statement that the record of the testimony in the District Court was considered by "agreement" of counsel was changed to read that it was considered "with the acquiescence" of counsel. This also is not a fact. This record shows no "acquiescence"; it shows Counsel's protest.

The record in this case is mainly constituted by the Petition, Answer and Opinion of the Court. Petitioner has included as an appendix to the Petition the printed record on appeal to the Supreme Court of Pennsylvania, together with certain relevant pre-trial petitions.

The issue raised by the petition was whether the sentencing court, although originally having jurisdiction of the subject matter and of the person of Petitioner, nevertheless lost that jurisdiction not by mere errors of law but by viola-

tion of Petitioner's right to procedural due process guaranteed him by the Fourteenth Amendment to the Constitution of the United States. *Bowen* v. *Johnston,* 306 U. S. 19, 23, 24, 59 S. Ct. 442. Since the Supreme Court of Pennsylvania refused to hear and decide the issues of fact raised by the Petition and Answer, the issue before this Court is whether, assuming the truth of the Petition, a violation of procedural due process has been shown. *Commonwealth ex rel McGlynn* v. *Smith,* 344 Pa. 41, 24 A. 2d 1; see *Pyle* v. *Kansas,* 317 U. S. 213, 216, 63 S. Ct. 177; *Cochran* v. *Kansas,* 316 U. S. 255, 62 S. Ct. 1068; *Rice* v. *Olson,* 324 U. S. 786, 65 S. Ct. 989.

The Petition alleged that Petitioner was indicted in the Court of Oyer and Terminer of Philadelphia County, Pennsylvania, at No. 384, February Term, 1948, for the murder of one John Haines, a taxicab driver, alleged to have occurred on January 15, 1948 (Pet. par. 2, R. 4).

The first point in the proceedings wherein Petitioner bases his claim of denial of due process was his arraignment. Petitioner, who was indigent, had been confined in the Philadelphia County Prison and had not retained counsel because he was without means to do so (R. 15). However, on the evening of February 24, 1948, a relative of Petitioner retained Herbert S. Levin, Esquire, to represent Petitioner. On the following day, without notice to Mr. Levin (who had not yet had time to enter a formal appearance) Petitioner was brought to the bar of the court and arraigned. Mr. Levin was not present (R. 15).

Even though the charge was a capital one, no attempt was made to ascertain if defendant was represented by counsel. An instant before arraignment, the court directed Joseph Alessandroni, Esquire, of the Philadelphia Bar, who was in the courtroom on other business, to stand beside Petitioner. Mr. Alessandroni was so directed only for the purpose of standing with Petitioner at the arraignment and had noth-

ing to do with the case either before or after the arraignment. Mr. Alessandroni did not know what Petitioner was charged with except that the offense was Murder. Mr. Alessandroni did not know whom Petitioner was charged with having murdered. Mr. Alessandroni did not know in what circumstances petitioner was alleged to have committed murder. Mr. Alessandroni had never seen Petitioner before the arraignment and never saw him thereafter. Mr. Alessandroni had no knowledge as to Petitioner's mental capacity or lack of mental capacity to be arraigned and stand trial. Mr. Alessandroni was afforded no opportunity by the court to consult with Petitioner. The only thing Mr. Alessandroni said to Petitioner was that he was not Petitioner's counsel and that Petitioner should plead Not Guilty. Mr. Alessandroni did not explain the nature of the proceedings to Petitioner (R. 15-16).

The Petition then avers that this arraignment of Petitioner was a violation of his constitutional right to the assistance of counsel within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Even though Petitioner actually pleaded Not Guilty on the advice of this lawyer who was a stranger to him, the violation of Petitioner's rights resulted in harm to him because of the fact that he thereby lost one opportunity to have his mental competency determined in accordance with the Pennsylvania Act of March 31, 1860, P.L. 427, Sec. 67, 19 P. S. 1352 (Appendix, p. 57) when considered in the light of Sec. 66 of the same Act, 19 P. S. 1351 (Appendix, p. 57). Under those provisions it becomes the duty of the court to have the sanity of a criminal defendant determined if such person "indicted for an offense shall upon arraignment be found to be a lunatic . . ." If his own counsel had been present or a seasonable appointment had been made, the protection of this statute could have been invoked.

Under this statute, the court, at the time of arraignment, either *sua sponte* or upon its attention being called to the matter by counsel or any other interested party, could have proceeded to direct such an inquiry.

By reason of the fact that petitioner was arraigned with family, friends and his own lawyer all absent, and since he was completely unknown to the court and no reason appearing to the court why such inquiry should be made, his plea of Not Guilty was filed, he was sent back to the County Prison and then one of his important rights was lost. The full prejudicial effect of this will appear presently.

Counsel, after being retained, was advised by Petitioner's family of an inquiry into Petitioner's mental competency conducted by a New York Court. He then presented a petition to the trial court (Court of Oyer and Terminer) which recited a previous adjudication of insanity and subsequent confinement in a mental hospital and requested the appointment of a commission to inquire into and report upon the mental condition of Petitioner, in accordance with the Mental Health Act of July 11, 1923, P.L. 998, 50 Purdon's Statutes 1, et seq., as amended. (Pet. Par. 5, R. 5.) This section appears in the Appendix, p. 57. Neither the Petition nor the Answer avers that such adjudication was ever vacated. A statement of Petitioner's mental background and diagnosis is contained in that Petition which was printed as part of the record on appeal. It is certified to this Court as an appendix to this petition (p. 66). It is treated in Petitioner's brief post p. 43.

The Petition for the appointment of a Commission was dismissed on April 2, 1948. The Answer discloses that the Petition was dismissed "for the reason that relator's counsel was not a proper party petitioner." (Answer par. 5, R. 18)

Again, petitioner was not afforded an opportunity to demonstrate *in limine* his mental incompetency to be tried.

The action of the court in dismissing the Petition was in accordance with the decision of the Supreme Court of Pennsylvania in *Commonwealth* v. *Green*, 346 Pa. 172, 29 A. 2d 491, which held that the court was without jurisdiction to entertain such a petition unless it was presented by the Warden or Keeper of the institution in which petitioner was confined.

This represents Petitioner's contention that for the second time he was denied the right to have his mental capacity judicially determined *in limine* unless the Warden of the jail gave his permission. It is clear that had he been on bail he could have successfully invoked the jurisdiction of the court without the joinder of the Warden. The full facts as to this situation are shown in the printed record on appeal. Petitioner argues the point fully in his brief, post p. 46, 49.

Counsel for Petitioner, having unsuccessfully endeavored to secure evidence from the officials in charge of the Brooklyn State Hospital, New York; and, as the Petition avers, such failure occurred by reason of the indigency of Petitioner, believed that Petitioner would be in better position to obtain help if he withdrew as privately retained counsel. Petitioner's counsel then filed a petition to withdraw as private counsel (Appendix, p. 68).

The petition to withdraw set forth the mental history of Petitioner and the inability of counsel to proceed with the proper preparation of Petitioner's case by reason of his poverty, and suggested the need of psychiatric assistance, and that upon the allowance of the petition to withdraw counsel could then be appointed to represent Petitioner who might possibly be in better position to obtain the needed assistance.

Upon allowance of the petition to withdraw as private counsel, appointed counsel endeavored to obtain a psychia-

tric examination of Petitioner, to no avail (Pet. par. 8, R. 5), and, in consequence, they were unable competently to determine whether petitioner was either sane at the time the offense was committed, or able to comprehend the charges against him, and able to cooperate in his defense on the several occasions his case was listed for trial. (Pet. par. 8, R. 5)

Counsel for Petitioner then discussed with the Assistant District Attorney assigned to the case their inability to obtain psychiatric services and were informed that under the case of *Commonwealth* v. *Green,* 346 Pa. 172, 29 A. 2d 491, the County of Philadelphia could not furnish such services at the expense of the County (Answer, par. 10, R. 19).

Therefore, at this point, Petitioner (a) being indigent and therefore unable to procure psychiatric assistance to enable him to conduct his defense, and (b) having been denied psychiatric assistance at the expense of the Commonwealth, which provides ample funds for prosecuting officers to obtain such assistance, and (c) having lost such right as he had under the Act of 1860, supra, to have his mental capacity inquired into at arraignment and (d) his petition under the Mental Health Act having been denied, was therefore denied any fair opportunity to establish (1) mental incapacity to be tried, or (2) mental incapacity to commit the crime of murder. He was thereby, in a fundamentally unfair way, forced into a cul-de-sac.

It would be unrealistic to suggest that counsel could have persisted in the plea of "Not Guilty". Petitioner had committed the act of killing. Without medical testimony or a commission in lunacy he could not hope to establish mental incapacity either as a defense or in bar of trial. Besides it would be unthinkable to put a man on trial before the same jury on the two issues of (1) mental capacity to be tried; and (2) guilt or innocence of the crime charged.

To so try a man in effect either rules out the first issue or prevents defendant from testifying on the second issue. Surely it would be absurd and unfair to make a defendant testify on the facts applicable to the crime and simultaneously have him attempt to convince the jury that he is so mentally incapable of understanding his situation that he does not know what he is talking about. Under the common law and under statutes enacted many years ago, defendants in capital cases were not competent witnesses; hence the anomalous situation pointed out above did not exist. Nor has it been eliminated by the Supreme Court in any case interpreting the Act making defendants competent.

Pennsylvania must be forced to meet the problem squarely. The defendant is entitled to have the issue of his mental capacity to stand trial disposed of before trial as a separate issue or he is not entitled to have it disposed of judicially at all.

When, therefore, counsel were notified that trial had been fixed for September 21, 1948, they conferred with Hon. Charles L. Guerin, to whom the case had been assigned for trial, and Colbert C. McClain, Esquire, the Assistant District Attorney in charge. This conference occurred pre-trial, and the foregoing facts were revealed and counsels' and petitioner's predicament was made known (Pet. par. 10, R. 5-6).

At such conference, counsel for Petitioner also mentioned their desire to have the trial court allow a petition to subpoena the records of the Brooklyn State Hospital, since they were material to the issue of Petitioner's sanity (Pet. par. 11, R. 6).

To preclude further delay, and it being agreed by the conferees that under Pennsylvania law, court-appointed counsel could not be provided with psychiatric examination and advice, it was further agreed between counsel, the

District Attorney and the court that the plea be changed to "Guilty", that the Commonwealth present its testimony on Sepember 21st before a court en banc, that the case be then postponed sufficiently to allow counsel to subpoena the New York records, and that if these records, when introduced in evidence, raised an issue or doubt of Petitioner's sanity, the court would consider withdrawal of the plea of "Guilty" (Pet. par. 12, R. 6). Thereupon, petitioner's plea was changed to "Guilty" on September 21, 1948 (Pet. par. 13, R. 6).

In accordance with Pennsylvania practice, the judge before whom the plea was entered, called upon two other judges to sit with him as a court en banc. Then, despite the foregoing facts, the court en banc having heard *only* the testimony of the Commonwealth as to the guilt of petitioner of the crime of murder, and despite the fact that there was still necessarily open at such time the factual questions of whether the evidence showed murder in the first degree, murder in the second degree, voluntary manslaughter, and also if the offense was murder in the first degree then the alternative punishments of death or life imprisonment, as provided for by Pennsylvania law, the court, nevertheless, adjudged Petitioner guilty of murder of the first degree (Pet. par. 14, R. 6), and ordered that the defense be restricted to evidence bearing only on the penalty to be imposed for first degree murder (Pet. par. 33, R. 10). Petitioner contends that this action constitutes a flagrant violation of procedural due process entirely apart from any question of insanity.

The Supreme Court of Pennsylvania, in its Opinion, while conceding that the docket entries show that the court adjudicated petitioner's guilt as that of murder in the first degree on September 21, 1948, nevertheless asserts that the entries on the back of the bill of indictment "show that the defendant was adjudged guilty of murder in the

first degree on February 4, 1949." (364 Pa. 93, 112, R. 46). This statement, however, is contradicted not only by its original opinion on appeal (362 Pa. 222, 66 A. 2d 764) but by the indictment itself which demonstrates that the docket entries were correct. A photostatic copy of the indictment is certified as an appendix to this petition following p. 62. Petitioner fully covers all phases of the question in his brief, p. 30, et seq.

On October 28, 1948 and November 5, 1948, the court heard further testimony on the issue of penalty only. Although the testimony raised a doubt as to Petitioner's sanity and mental capacity to plead and stand trial, or participate in the hearing, cooperate with counsel and make his defense, the guilty plea was not permitted to be withdrawn (Pet. par. 15, R. 6).

Then on February 4, 1949, petitioner was sentenced to death. Timely appeal was taken to the Supreme Court of Pennsylvania.

On June 24, 1949, the Supreme Court of Pennsylvania affirmed the judgment of the court below.

Although petitioner, indirectly at least, raised some of the constitutional questions raised herein, they were not disposed of by the Supreme Court of Pennsylvania (Pet. pars. 18, 19, 20, R. 7). Since the appeal was disposed of purely on state law a petition for certiorari to this Court would have been an idle gesture.

Petitioner, after having applied for a pardon and filed his petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania, then filed his petition to the Supreme Court of Pennsylvania. Despite the foregoing averments of that Petition, the Supreme Court of Pennsylvania refused to conduct any hearing. Therefore, petitioner contends that not only did the Supreme Court of Pennsylvania fail to correct the denial of

procedural due process by the trial court but itself denied procedural due process to Petitioner.

Petitioner therefore petitioned for rehearing, specifically claiming such violation of federal rights (R. 54) but the Petition was denied by the Supreme Court of Pennsylvania on February 9, 1950. This question is briefed by Petitioner at p. 19.

II. Basis of Jurisdiction

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929, 28 U.S.C.A. sec. 1257(3).

The decision sought to be reviewed is a final judgment of the Supreme Court of Pennsylvania, the highest appellate court of that state, denying a petition for writ of habeas corpus.

In the Supreme Court of Pennsylvania, Petitioner specifically set up and claimed under the Fourteenth Amendment to the Constitution of the United States his right not to be deprived by the Commonwealth of Pennsylvania of his life and liberty without due process of law. Petition for Rehearing was denied February 9, 1950 (R. 59).

III. Questions Presented

1. Was it a denial of procedural due process of law for the Supreme Court of Pennsylvania to refuse to permit Petitioner to prove by testimony the facts alleged in a petition for habeas corpus which prima facie showed deprivation of procedural due process?

2. Did the Supreme Court of Pennsylvania violate Petitioner's right to procedural due process by considering testimony which was not properly before it, which testimony had been taken in a Federal District Court proceeding, which proceeding had involved only some of the issues raised in the Supreme Court of Pennsylvania?

3. Where Petitioner had a long history of mental disease including medical discharge from the Army, treatment in mental hospitals and an adjudication of insanity without subsequent adjudication of sanity, was it a denial of procedural due process of law to arraign him on a capital charge in the absence of his family, friends and counsel where the loss of a statutory method of having his mental incapacity to be tried judicially determined *in limine* by the court resulted from the failure to make the need for such determination known to the court "upon arraignment"?

4. Consonant with due process can Pennsylvania empower a court to try a defendant charged with first degree murder, deny that court power to try insane defendants, and then also deny that court power to determine the putative insanity of such a defendant prior to trial unless the prison Warden requests such determination?

5. As between persons who have been merely charged with crime, whether felony or misdemeanor, does Pennsylvania deny equal protection of the laws by providing a statutory procedure whereby the question of the insanity of persons on bail will be determined *in limine* by the court simply upon a prima facie showing of insanity, but persons not on bail are denied such determination, however great the prima facie showing, unless the prison Warden requests such determination?

6. Where almost the whole of Petitioner's defense is insanity, and he is indigent and thereby unable to procure psychiatrists, and the law of Pennsylvania permits the prosecution to hire psychiatrists at public expense to prove Petitioner sane, is it a denial of due process of law to refuse to appoint psychiatrists to assist Petitioner?

7. On a guilty plea admitting second degree murder only was it a violation of procedural due process for the trial

court, having heard only the testimony of the prosecution, to adjudge Petitioner's guilt to be murder of the first degree and to refuse thereafter to consider or indeed hear *any* testimony (whether medical or not) except on the issue of penalty?

IV. Reasons Relied On for the Allowance of the Writ

Petitioner filed in the Supreme Court of Pennsylvania an original Petition for a Writ of Habeas Corpus asserting that he had been denied due process of law. By its action in issuing a rule to show cause, the Supreme Court recognized that the petition made out a case. But the Supreme Court not only failed to redress the grievances complained of, it violated due process itself by refusing petitioner any opportunity to prove his case and refused the writ after taking into consideration matters picked and chosen at will from an entirely different proceeding which was not properly before it.

One of the wrongs complained of in the habeas corpus petition was that although Petitioner's guilty plea did not and could not admit more than second degree murder, the trial court had adjudged Petitioner guilty of first degree murder immediately at the conclusion of the prosecution's case and had ordered defense counsel to produce no evidence except evidence bearing upon which of the alternative penalties, life imprisonment or death, should be imposed for what the court had already adjudged to be first degree murder.

The above questions arise irrespective of other, perhaps more provocative and presently agitating questions which involve the very heart of the application of due process to the administration of criminal justice—questions regarding insanity pre-trial and at the time of trial.

In *Solesbee* v. *Balkcom,* 94 L. Ed. 346 and *Phyle* v. *Duffy,* 334 U. S. 431, 68 S. Ct. 1131, this Court just recently

enunciated principles of constitutional law applicable to insanity when it occurs post-trial, but made it clear that questions of insanity pre-trial and at the time of trial present entirely different problems. The latter fall within the sphere of "procedural safeguards". The present case presents an abundance of such questions which occur (a) at arraignment (b) pre-trial and (c) during the hearing of testimony to determine both the degree of the offense and the punishment upon a plea of guilty to murder.

No matter involving American law as administered in the criminal courts is more in need of a definitive answer. Petitioner's case raises questions which cry aloud for solution by this Court entirely apart from the important fact that upon their solution depends Petitioner's life. Pennsylvania's answer to the questions was to deny Petitioner due process of law at every turn of his case.

His mental history included an adjudication of insanity with no subsequent adjudication of sanity. By petitions for the appointment of a commission and for leave to withdraw as counsel, as well as by oral applications, his counsel directed the attention of the trial court to the substantial probability that Petitioner had not been mentally competent to be arraigned and was not mentally competent to be tried.

But Pennsylvania arraigned Petitioner with a stranger at his side and thus cut off his right to have his counsel effectively assist him by having the issue of mental competency determined at that time as provided for by Pennsylvania statute. Pennsylvania judges, acting in accordance with what they thought to be the law of Pennsylvania, refused on at least three occasions to appoint psychiatrists, permitted Petitioner's trial counsel to change his plea to "Guilty", and were content to have a psychiatrist examine him only after they had adjudged him guilty of first degree

murder, and then the report of the psychiatrist was limited to the "right and wrong test" which is relevant only to the capacity to commit crime and not to the capacity to be arraigned and stand trial.

It is important to the administration of criminal justice by the states in the light of the due process clause of the Federal Constitution that this Court pass upon the very real problems presented by this record.

WHEREFORE, your petitioner, James Smith, respectfully prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the Supreme Court of Pennsylvania, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings therein; and that the order of the Supreme Court of Pennsylvania affirming the judgment and sentence be reversed and that your petitioner have such other and further relief in the premises as to this Court may seem just and proper.

THOMAS D. MCBRIDE,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Supreme Court of Pennsylvania Not Only Failed to Correct the Denial of Procedural Due Process by the Trial Court in the Main Trial, But Itself Denied Procedural Due Process in This Proceeding.

Petitioner filed an original petition for a writ of *habeas corpus ad subjiciendum* in the Supreme Court of Pennsylvania. Constitution of Pennsylvania, Art. 5 sec. 3; *Williamson* v. *Lewis,* 39 Pa. 9; *Commonwealth* v. *Heston,* 292 Pa. 63, 140 A. 533. This is an appropriate proceeding under Pennsylvania law to test questions of the type presented. *Commonwealth ex rel. Milewski* v. *Ashe,* 362 Pa. 48, 66 A. 2d 281; *Commonwealth ex rel. Townsend* v. *Burke,* 361 Pa. 55, 63 A. 2d 77; *Commonwealth ex rel. Piccirelli* v. *Smith,* 150 Pa. Super. 105. The averments of that sworn petition, if true, showed that the trial Court, by violating the fundamental rights of Petitioner, during its proceedings lost its jurisdiction to proceed to judgment. *Bowen* v. *Johnston,* 306 U. S. 19, 23, 24, 59 S. Ct. 442. The Commonwealth did not contend to the contrary, but merely denied the factual averments.

The Supreme Court itself judicially determined not only that the petition was procedurally correct but that it stated a prima facie case. It did this by granting a rule upon the Commonwealth to show cause why the Writ should not be granted (R. 13). This practice is a permissible alternative to the immediate issuance of the Writ itself. *Commonwealth ex rel. McGlynn* v. *Smith,* 344 Pa. 41, 24 A. 2d 1; see also *Walker* v. *Johnston,* 312 U. S. 275, 61 S. Ct. 574.

Had it not so determined, it would have dismissed the petition without even granting the rule. See *Commonwealth ex rel. McGlynn* v. *Smith,* 344 Pa. 41, 47, 24 A. 2d 1; *Commonwealth ex rel. Milewski* v. *Ashe,* 362 Pa. 48, 50, 66 A. 2d 281.

Since, therefore, the facts, if true, warranted relief, it is submitted that Petitioner was, as a matter of right, entitled to an opportunity to prove that they were true.

The Supreme Court of Pennsylvania denied that opportunity to Petitioner. See *Pyle* v. *Kansas,* 317 U. S. 213, 216, 63 S. Ct. 177; *Cochran* v. *Kansas,* 316 U. S. 255, 62 S. Ct. 1068; *Rice* v. *Olson,* 324 U. S. 786, 65 S. Ct. 989. It held no hearing whatever nor did it refer the case to any tribunal to take testimony. No facts were found nor legal argument had on any agreed state of facts.

Instead, the Court disposed of the whole question on matters which were not of record. The Court says in a foot note to its Opinion (R. 32): "Habeas Corpus proceedings in behalf of Smith were begun in the United States District Court at Philadelphia, and on October 4, 1949, testimony was taken there. With the acquiescence, at Bar, of the respective Counsel, this testimony was made a part of the record of the proceeding here". This is simply not so. This statement is made without any basis whatever, either of fact or law. A habeas corpus petition *was* filed in the United States District Court and testimony was taken in that Court, but the record of this case not only does not show any "acquiescence" of Counsel that such testimony be made a part of this record, but, on the contrary, conclusively demonstrates the opposite.

The record shows that Petitioner's Counsel called the attention of the Supreme Court of Pennsylvania to the fact that it would be improper to dispose of the case upon petition and answer (R. 55-57). Both orally at Bar and in a brief filed contemporaneously with oral argument, he stated his objection to proceed in that fashion (R. 55-57). Some time thereafter, but prior to decision, Petitioner's Counsel filed a brief of law with the Court and again called to the attention of the Court the necessity of a hearing before a member of

that Court or that the matter be sent back for hearing before one of the judges of the lower court (R. 56, 57).

The next thing that happened was that the Supreme Court filed an Opinion, refusing the petition for writ of habeas corpus without having held any hearing before any member of that Court, or, indeed, any hearing before any judge or even on depositions. In that Opinion, as originally filed, the Court, speaking of the testimony previously taken in the United States District Court, recited that "by agreement, this testimony was made a part of the record of the proceeding here". (R. 54).

Upon receipt of a copy of that Opinion, the writer of this petition, who had orally argued the matter before the Supreme Court of Pennsylvania, filed a verified petition for reargument, demonstrating that the Opinion was incorrect and unsupported by the record or the facts (R. 54). The Commonwealth filed no answer whatever denying the averments of this petition for re-hearing.

Nevertheless, the Supreme Court simply changed the language of footnote 2, which in the original Opinion indicated that the Court considered the testimony given in the District Court "by agreement of Counsel" to "by acquiescence of Counsel" (R. 32). Therefore, the Record shows that the Opinion of the Supreme Court of Pennsylvania states what is not a fact and its decision is based not upon a hearing held in accordance with due process of law but upon matters which were not part of the record in this case.

It is submitted that Counsel for Petitioner properly could not have "agreed" much less "acquiesced" that conflicting testimony taken in a Federal Court be made the basis for decision by a State Appellate Court on an issue of life or death where none of the Justices of the Appellate Court ever saw or heard the witnesses and where no machinery was provided whereby findings of fact on disputed testimony could be made by any Pennsylvania tribunal.

The Supreme Court, speaking of the proceeding in the United States District Court, says (R. 33): "In that hearing these facts were brought out * * *" but there was no finding by the District Court that these were facts. The District Court never reached the merits and disposed of the petition on territorial jurisdictional grounds. Even the Supreme Court of Pennsylvania did not make findings of facts. There was much testimony and many issues raised by that testimony in the District Court to which the Opinion of the Supreme Court does not even refer. The Opinion simply picks and chooses from that testimony certain bits of evidence which seem to comport with its ultimate conclusion. If that testimony *were* part of this record, a fair reading of it would support Petitioner's contentions.

Even if Counsel in the ordinary case could, without his client's knowledge, waive anything so fundamental as the right of his client to a hearing it is unthinkable that he would do so while at the same time contending that his client was mentally incompetent. Nobody pretends that Petitioner was "at Bar" when Counsel is said to have "acquiesced". The Court's own order shows that he was not to be present at oral argument (R. 13). Such "acquiescence" could not confer upon the Pennsylvania Supreme Court jurisdiction to act upon conflicting testimony taken in a court of a foreign jurisdiction.

Petitioner's brief as to the facts he expected to be able to prove, which was filed contemporaneously with the oral argument (R. 55) and his brief on questions of law, which was filed thereafter but prior to decision, ought to have eliminated any such question of "acquiescence". Even after the Opinion of the Supreme Court was filed and Counsel, upon his oath, challenged the correctness of the statement that he had agreed to have this writ decided

without findings of fact upon which the law could have been declared, the Court was under a duty to proceed in accordance with law to have the facts determined instead of insisting upon a non-existing "acquiescence".

If this were not enough, surely the Supreme Court of Pennsylvania had to afford a hearing when Petitioner, formally of record, challenged on procedural due process grounds the right of the Court to deny him one (R. 58).

The Supreme Court of Pennsylvania cannot, consistently with the Constitution, predicate a waiver of hearing, or acquiescence in the lack of one, upon a misstatement.

It is submitted, therefore, that the Supreme Court of Pennsylvania was under the bounden duty to determine this writ in a fundamentally fair way by having the controverted facts found by some Pennsylvania tribunal in accordance with law.

The decision itself and every part of the Opinion of the Supreme Court of Pennsylvania which relies upon anything except the record constitutes in itself a denial of due process of law. Not only, therefore, has the Supreme Court of Pennsylvania failed to redress the denial of due process which occurred in the lower Court, but it has itself denied procedural due process to this Petitioner in the very proceeding which is now before this Court.

Petitioner Was Denied the Effective Assistance of Counsel at His Arraignment. Even Though He Entered a Plea of "Not Guilty" He Was Prejudiced Thereby.

Paragraph 3 of the Petition for Writ of Habeas Corpus as amended avers (R. 15):

> "At all times material to this case, Relator has been indigent and thereby unable to secure counsel to effectively aid and assist him. However, on the evening of February 24, 1948, a relative of Relator retained Herbert S. Levin, Esquire, to represent Relator. On

February 25, 1948, without notice to Mr. Levin, who had not yet entered a formal appearance, Relator was brought from the County Prison and arraigned. Mr. Levin was not present. No attempt was made to ascertain if defendant was represented by counsel. An instant before arraignment the court directed Joseph Alessandroni, Esquire, of the Philadelphia Bar, who was in the courtroom on other business, to stand beside Relator. Mr. Alessandroni was appointed only for the purpose of standing up with Relator at the arraignment and had nothing to do with the case either before or after the arraignment. Mr. Alessandroni did not know what Relator was charged with except that the offense was Murder. Mr. Alessandroni did not know whom Relator was charged with having murdered. Mr. Alessandroni did not know in what circumstances Relator was alleged to have committed murder. Mr. Alessandroni had never seen Relator before the arraignment and never saw him thereafter. Mr. Alessandroni had no knowledge as to Relator's mental capacity or lack of mental capacity to be arraigned and stand trial. Mr. Alessandroni was afforded no opportunity by the court to consult with Relator. The only thing Mr. Alessandroni said to Relator was that he was not Relator's counsel and that Relator should plead Not Guilty. Mr. Alessandroni did not explain the nature of the proceedings to Relator. It was only thereafter that Relator was presented with the form usually filled out in indigent cases provided for by the Act of March 22, 1907, P. L. 31, Section 1, 19 P. S. 784. Such form requested the appointment of counsel in accordance with said Act and the appointment was made sometime between April 20 and April 27th, 1948. Mr. Levin previously had been granted leave to withdraw under the circumstances stated in paragraphs 5, 6 and 7 hereof. However, the court appointed Mr. Levin and Harry M. Berkowitz, Esquires, to represent Relator."

The Commonwealth did not deny the truth of these averments but merely demanded proof thereof. But the Su-

preme Court of Pennsylvania gave Petitioner no opportunity to prove them.

From the foregoing it is apparent that Petitioner was denied the effective assistance of counsel at his arraignment. If such denial harmed him, due process was violated. *Townsend v. Burke,* 334 U. S. 736, 68 S. Ct. 1252. In a capital case harm is presumed. That the denial did harm Petitioner is apparent from the fact that the unavoidable ignorance of the stranger who stood beside him at arraignment caused Petitioner to lose one of his efficient remedies to have his sanity tested. For if a lawyer, who had knowledge of Petitioner's predicament, had represented him at arraignment, that lawyer could have had Petitioner's sanity tested by calling to the attention of the Court, at that time, the facts with regard to Petitioner's mental history that would clearly have warranted the inquiry required by Section 67 of the Act of March 31, 1860, P. L. 427, 19 Purdon's Statutes 1352, which reads as follows:

> "The same proceedings may be had, if any person indicted for an offense shall, upon arraignment, be found to be a lunatic, by a jury lawfully impanelled for the purpose, or if, upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be a lunatic, the court shall direct such findings to be recorded, and may proceed as aforesaid."

Section 67, quoted above refers back to Section 66 both of which are quoted in the appendix to the Petition for Certiorari (p. 57).

The defendant was overreached not because of any dereliction personal either to the Judge who presided at the arraignment or the Assistant District Attorney who later was placed in charge of the case. He was overreached by the system of only appointing counsel for indigent persons in capital cases *after* arraignment which has obtained in Philadelphia County for many years. The necessity of

appointment of counsel in capital cases applies to every stage of the proceedings, *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, including arraignment. *Evans* v. *Rives*, 126 F. 2d 633; *Robinson* v. *Johnston*, 50 F. Supp. 774. This failure created the later impasse and prejudicially affected the later proceedings. *Commonwealth ex rel. Townsend* v. *Burke*, 361 Pa. 35, 63 A. 2d 77; *Commonwealth* v. *Simanowicz*, 242 Pa. 402, 89 A. 562.

Even the Opinion of the Supreme Court points up the harm resulting from the arraignment. The Court says (R. 41, 42):

> "• • • Now counsel contends that the insanity with which Smith was afflicted in 1945 was permanent. If it was, he was insane at the time he committed the murder charged and it was the duty of the defendant's counsel to ask to have the issue of his sanity determined by a court and jury as provided by Section 67 of the Act of March 31, 1860, P. L. 427, 19 P. S. 1352."

Petitioner agrees that it was the duty of defense counsel to have the issue of Petitioner's sanity determined by a court and jury as provided by Section 67 of the Act of 1860. But the stranger who stood beside Petitioner at arraignment as "defense counsel" was necessarily uninformed of the facts which made it imperative that Petitioner's sanity be determined. Therefore counsel could not ensure that the matter was inquired into upon arraignment.

It is true that Section 67 of the Act of 1860 also provides that defendant's sanity may be inquired into, by the jury "upon the trial"—which means the very jury which tries the indictment itself. *Commonwealth* v. *Scovern*, 292 Pa. 26, 140 A. 611. But we respectfully suggest that such a course does not meet the test of due process. It is essentially unfair to put a man on trial before the same jury on the two issues of (1) mental capacity to be tried; and (2) guilt or innocence of the crime charged.

To so try a man in effect either rules out the first issue or prevents defendant from testifying on the second issue. Surely it would be absurd and unfair to make a defendant testify on the facts applicable to the crime and simultaneously have him attempt to convince the jury that he is so mentally incapable of understanding his situation that he does not know what he is talking about. Under the common law and under statutes enacted many years ago, defendants in capital cases were not competent witnesses; hence the anomalous situation pointed out above did not exist. Nor has it been eliminated by the Supreme Court in any case interpreting the Act.

Pennsylvania must be forced to meet the problem squarely The defendant is entitled to have the issue of his mental capacity to stand trial disposed of before trial as a separate issue, or he is not entitled to have it disposed of judicially at all.

That due process entitles him to have it so disposed of is shown inferentially by the case of *Phyle* v. *Duffy*, 334 U. S. 431, 68 S. Ct. 1131. In that case defendant had been sentenced to death. But *after his conviction* he had been pronounced insane in a judicial proceeding and committed to a state institution. The California statute provided that a man so committed could later be put to death if the doctor in charge of the institution subsequently pronounced him to be sane. The Doctor in charge of Phyle's institution pronounced him sane, but without notice to Phyle and without any opportunity on Phyle's part to have a judicial determination of whether he had recovered or a judicial review of the doctor's findings. Phyle sued out a writ of habeas corpus which the highest appellate court of California denied. He then sought certiorari and this Court granted it, but denied relief on the ground that adequate state procedure was still open to the Petitioner.

But in doing so this Court upheld the contention which we now make that although due process does not require the court to afford a judicial determination of sanity upon a mere suggestion of the possibility of insanity, due process, nevertheless, requires that where a prima facie showing of insanity is made, a judicial determination of that important question must be afforded the defendant. Certainly that is true of pre-trial insanity.

Solesbee v. *Balkcom* decided February 20, 1950, 94 L. Ed. 396, gives point to the present situation. There, this Court in holding that due process of law does not require judicial decision of a claim of insanity *after* conviction was careful to point out the distinction between pre-trial procedural safeguards and post trial procedures as to sentencing and clemency. Here, the infringement was of a pre-trial procedural safeguard.

To determine the issue of capacity to stand trial simultaneously with the issue of guilt or innocence would be ridiculously unfair. Therefore it would violate due process. *Adamson* v. *California,* 332 U. S. 46, 53, 67 S. Ct. 1672. To determine the issue of sanity pre-trial in accordance with the Act of 1860 by deciding at the time of arraignment to impanel a jury would be fair enough. But this Petitioner had no opportunity to have it determined at that time, for he was arraigned with a stranger at his side and that stranger knew nothing of the case and therefore could not see to it that the Act of 1860 was complied with upon arraignment (R. 15, 16).

Petitioner also invites the attention of the Court to the case of *Frame* v. *Hudspeth,* 109 F. 2d 356 (10th Circuit), in which it was held that where the trial court's attention was called to the fact that accused had once been adjudged insane and had been an inmate of an insane asylum, it became the court's duty to make a specific finding re-

garding accused's mental condition and in absence of any such finding the proceedings at time of trial could not be sustained. However, the Circuit Court of Appeals did not reverse the District Court which had failed specifically to make such a finding, holding that there was sufficient evidence on the record to show that the District Court was justified in accepting a plea of guilty. One judge dissented. This Court granted certiorari and reversed the Circuit Court of Appeals and directed that the case be remanded for a specific finding. *Frame* v. *Hudspeth,* 309 U. S. 632, 60 S. Ct. 712.

In *Robinson* v. *Johnston,* 50 F. Supp. 774, it was held on habeas corpus that where the trial court knew at accused's arraignment and guilty plea that a Tennessee adjudication of defendant's insanity was in effect and no judicial decree of restoration to capacity had been entered, the trial court was under a duty to determine accused's mental condition before accepting his plea.

In *Honaker* v. *Cox,* 51 F. Supp. 829, it was held on habeas corpus that where the prisoner had been found insane before he appeared to answer a criminal charge, in view of the presumption that his condition continued, the judgment of conviction was void.

The effect of *Mooney* v. *Holohan,* 294 U. S. 103, 55 S. Ct. 340, is that where the court has knowledge requiring the exercise of a duty on behalf of the accused the failure to exercise such duty constitutes a denial of due process. The Pennsylvania trial court had knowledge of this Petitioner's predicament for his Counsel had directed the attention of the court to it by the petition for the appointment of a commission and by the petition for leave to withdraw as Counsel. See paragraphs 5 and 7 of Petition for Writ of Habeas Corpus (R. 5).

It is to be emphasized that the testimony of Dr. Drayton does not affect the situation, for it was not received until

after Petitioner's guilt had been adjudged to be murder of the first degree and even then it was directed only to the issue of the Petitioner's mental capacity to commit crime and not to his mental capacity to stand trial at all. The former involves the so-called "right and wrong" test, the latter is concerned with mental awareness of the dangers of trial and ability to cooperate with Counsel.

The Trial Court Adjudicated the Degree of Petitioner's Crime to Be Murder of the First Degree After Hearing the Prosecution's Evidence Only and Refused to Hear His Evidence on That Question.

The section of the Pennsylvania "Criminal Code" applicable alike to the substantive and procedural aspects of the crime of murder is Section 701 of the Act of June 24, 1939, P. L. 872, 18 Purdon's Statutes 4701 (inserted in Appendix at 61). So far as material it reads as follows:

> "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. If such person is convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.
>
> "Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. The court shall impose the sentence

so fixed, as in other cases. In cases of pleas of guilty, the court, where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life."

A plea of guilty of murder admits only that defendant is guilty of *second degree murder*. *Commonwealth* v. *Iacobino*, 319 Pa. 65, 178 A. 823. The indictment (Appendix following p. 62) charges murder generally and not any specific degree thereof. If the Commonwealth seeks a finding of murder in the first degree it assumes the burden of convincing the court that beyond a reasonable doubt the facts show all essential elements of murder in the first degree. If there be a reasonable doubt of the existence of any such essential element the crime is only murder of the second degree. Therefore, despite the plea, the Court bases its decision on the facts it finds from the evidence.

Therefore the Fourteenth Amendment guaranteed this petitioner the right to have the evidence on his behalf heard before the trial court could find him guilty of first degree murder. *Snyder* v. *Massachusetts*, 291 U. S. 97, 116, 54 S. Ct. 330. But the trial court denied this right to Petitioner.

Some time prior to September 21, 1948, counsel for Petitioner and the Prosecuting Attorney had a conference with Judge Guerin. At that conference it was agreed by the conferees that the plea of not guilty theretofore entered would be changed to "Guilty", that on September 21st only the testimony of the Commonwealth would be presented and the matter would then be continued so that Petitioner could produce the record of New York State mental institutions, and the case would be continued "to permit the introduction of this testimony as well as any other evidence which the defendant desired to submit". This is admitted by the Commonwealth in its Answer (R. 20).

In accordance with this understanding Petitioner's plea was changed to Guilty on September 21, 1948 (Petition, paragraph 13, R. 6) and Judge Guerin called in Judges Carroll and Sloane to sit with him as a court en banc.

The petition shows that the plea of guilty was a temporary expedient resorted to because of the inability to get records from outside the State and that the whole problem was put in the lap of the court with the understanding that if the evidence raised a doubt of petitioner's sanity the court would consider withdrawal of the plea of guilty (Petition, paragraph 12, R. 6).

The printed record of the main trial used in the Supreme Court, of which that Court took judicial notice and which has been attached as an Appendix to the Petition for Certiorari, demonstrates the following:

After the Commonwealth rested, it apparently came as a matter of surprise to Judge Carroll that Petitioner was not in position to proceed. The circumstances under which the plea was entered were then narrated to him and after a conference among the judges and even though Petitioner had not yet produced any evidence, the degree of the offense was fixed at murder of the first degree and it was directed that any evidence to be offered by the defendant or any of his witnesses would be considered only in mitigation of the penalty. Counsel were directed to have such a statement signed by the defendant and his counsel. No such statement was signed.

Here is what the Court said: (76a)

"(The Court recessed for a conference.)

AFTER RECESS

JUDGE GUERIN: Gentlemen, we have taken the matter under consideration. We feel that there is but one announcement to be made at this time. The order

requested in the petition will be made and the return day fixed for Wednesday, October 27th. In the meantime it will be understood that a written statement of the defendant's position will be embodied in the record stating that the purpose of the medical testimony sought to be secured from New York is simply in mitigation of the penalty, and also any other testimony that may be offered by the defendant, and have the statement signed by the defendant and by counsel.

The case is continued to Wednesday, October 27, 1948, in this Room, at 10:00 o'clock A.M."

In the Opinion filed in this proceeding the Supreme Court at footnote 13 (R. 46) improperly indicates that there was some kind of an agreement between counsel and court that any evidence subsequently introduced would be only in mitigation. On September 21st only the evidence of the Commonwealth was heard and the statement of counsel for defendant (75a) demonstrates the mere procedural purpose of the plea of guilty. The court then inquired of counsel whether the evidence to be heard on behalf of defendant would be offered in mitigation of punishment or as affecting the degree or grade of the crime (75a). Counsel, who had not seen the records in New York, which were the *only testimony which was being discussed at that time*, said that that evidence, i.e., the evidence as to mental condition from New York so far as he knew, would be offered for mitigation purposes.

The Order itself was made, as the record shows, after a conference and the Supreme Court has, for some inexplicable reason, failed to quote the entire Order of Judge Guerin. As noted above, the Order directed that the medical testimony sought to be secured from New York would be considered simply in mitigation of the penalty but added "and also any other testimony that may be offered by the

defendant, and have the statement signed by the defendant and by counsel."

Footnote 13 of the Opinion of the Supreme Court deleted the language quoted directly above.

Although the Supreme Court in its Opinion now says that it is a disputed fact whether petitioner was adjudged guilty of murder in the first degree on September 21, 1948, it did not say any such thing in its official opinion affirming the judgment of sentence of death in the main case. Indeed, if anything further is needed to show the correctness of our position, this Court need only refer to the official report of the main case, *Commonwealth* v. *Smith,* 362 Pa. 222, at page 223 of which the Opinion, which was written by the same Chief Justice who subsequently wrote the Opinion in the habeas corpus case, says:

> "This is an appeal based upon alleged abuse of discretion by the Court below in imposing the death penalty after appellant's plea of guilty of murder. James Smith pleaded guilty to an indictment charging him with the murder of John J. Haines on September 21, 1948, in Philadelphia. *On the same day he was adjudged guilty of murder in the first degree* by the court en banc, composed of Judges CHARLES L. GUERIN, JOSEPH SLOANE and VINCENT A. CARROLL." (Emphasis supplied)

From the foregoing it is clear that there is substance to the paragraphs in the petition for a writ of habeas corpus which averred that the trial court violated due process by adjudging Petitioner guilty of first degree murder without first permitting him to present his defense, which was not only contrary to law but contrary to the agreement which was made prior to the entry of the plea. The Supreme Court with respect to this says, at page 112 of 364 Pa.:

> "Relator's counsel contend that Smith was denied due process of law because certain evidence as to his

mental condition was taken after the Court had entered a judgment of guilty of murder in the *first degree* against him. The *docket entries* in this case show that judgment of guilty of murder in the first degree was entered on *September 21, 1948,* while the entries on the back of the bill of indictment (which entries are signed by Judges Guerin, Sloane and Carroll) show that the defendant was adjudged guilty of murder in the first degree on February 4, 1949. Whether this judgment was entered on September 21, 1948, or on February 4, 1949, is unimportant in these proceedings."

The Supreme Court has completely misapprehended Petitioner's position and has misstated the record. It is certainly true that the docket entries in this case show that judgment of guilty of murder in the first degree was entered September 21, 1948. It is not true that the entries on the back of the indictment show that Petitioner was adjudged guilty of murder in the first degree on February 4th, 1949. A true and correct photostat of that indictment has been certified by the Supreme Court of Pennsylvania. We invite the attention of the Court to the endorsements thereon (Appendix following p. 62).

There is no explanation whatever in this record as to how or when the date of February 4, 1949, was inserted. It seems pretty clear that it was not inserted at the time the docket entries were made up and must have been inserted thereafter. What the Supreme Court of Pennsylvania said about it cannot be regarded as a finding of fact. This was pointed out to the Supreme Court on the petition for re-hearing. It is not an afterthought (R. 58).

An analysis of the photostat shows that the plea of guilty was entered on the 21st day of September, 1948, and then it proceeds "*Eo die* after hearing testimony both for the Commonwealth and the defendant the defendant is adjudged guilty of murder in the 1st degree". It is true that at the end of the indictment it contains the signatures

of all three judges but there is nothing whatever to show that the date 2/4/49 which appears between the lines was on that indictment at the time they signed it. Indeed it would appear from the Opinion of the Supreme Court of Pennsylvania, in the main case, that that date was not on the indictment because that Court stated unequivocally that the defendant was adjudged guilty on September 21, 1948, as quoted above.

It likewise appears that the date 2/4/49 was inserted afterward because it precedes the date 11/5/48 which appears below it. Finally, it would seem that all doubt is removed by the fact that the entry 2/4/49, which occurs again still further down, is followed by the following language "In accordance with the above adjudication the defendant is sentenced to death in the manner provided by law". This clearly demonstrates that there were two separate findings, the first being as to the degree of the crime and the second being as to the punishment. The court would not have referred to "the above adjudication" had it not made its findings separately.

Therefore, not only does the official record support Petitioner's contention that he was denied due process by a premature finding as to the degree of his guilt but the Opinion of the Supreme Court, on the appeal, supports him as does the unequivocal averment of his petition, which, if there were doubt as to its truthfulness, he was entitled to prove.

Had Petitioner been given the opportunity he could have called the person who made up the docket entries and shown that they are made up after the disposition of the case when the indictment finds its way into the main office of the Court of Oyer and Terminer and a copy thereof, which is sent to the Supreme Court of Pennsylvania, is not made up and officially certified until the writ of certiorari is filed in the office of the Clerk.

It is obvious that either the Supreme Court of Pennsylvania is in error in its interpretation of the entry on the indictment or the Clerk of Oyer and Terminer was in error in his interpretation. It is equally open to the interpretation that the date 2/4/49 interlinearly inserted, was not on that indictment at the time the Clerk sent the docket entries to the Supreme Court of Pennsylvania but was inserted thereafter by some person under circumstances presently unknown.

This peculiarly is the type of an issue which should have been heard in the habeas corpus proceeding.

Even the Court's Opinion says in a footnote (R. 32) that "whether he had been adjudged guilty of murder in the first degree on September 21, 1948, or on February 4, 1949, is a fact in dispute which we will discuss later in this opinion." If, in truth, it be a fact in dispute, upon what authority does the Supreme Court of Pennsylvania proceed to assume jurisdiction to decide it without hearing?

The Supreme Court assumes to decide this disputed question without hearing because it holds as follows (R. 46.):

> "Whether this judgment was entered on September 21, 1948, or on February 4, 1949, is unimportant in these proceedings. When counsel for the relator entered a plea of guilty to the indictment, that plea admitted the prisoner's sanity because no insane person can be guilty of murder. The testimony relating to Smith's mental condition, taken after the plea had been entered, was for the purpose of providing the court with data which it could use in determining the appropriate penalty to be imposed upon the defendant. See *Com.* v. *Williams,* 307 Pa. 134, 156, 160 A. 602; *Com.* v. *Dague,* 302 Pa. 13, 152 A. 839; *Com.* v. *Hough,* 358 Pa. 247, 251 56 A. 2d 84."

This seems to be a very easy disposition of the matter. In effect, although without saying so, the Supreme Court

of Pennsylvania is invoking the doctrine of harmless error. What the Court is really saying is that even if the trial court had no right to decide the degree of guilt on September 21st, the only evidence offered thereafter was in mitigation of penalty and could properly be only so considered.

Thus the Supreme Court minimized the trial court's action by saying that Petitioner's evidence went only to the issue of the penalty to impose for first degree murder and not to the issue of whether petitioner's guilt rose above second degree murder. If this is so it is only because, as we have demonstrated, the trial court's arbitrary order compelled counsel to present no evidence on the issue of degree of guilt.

On September 21, 1948, the petition to secure the records from mental institutions in the State of New York was granted, and the case was then continued until October 28, 1948, on which latter date, testimony was presented, including the diagnosis made by psychiatrists at the request of the King's County Court, showing the psychotic condition above referred to; the adjudication of that Court; the examinations at the Brooklyn State Hospital confirming the diagnosis of schizophrenia (except that it was found to be catatonic rather than hebephrenic, catatonic being a more serious type of schizophrenia), and petitioner's subsequent release on October 11, 1945, as "recovered". In addition thereto, the trial court accepted in evidence a letter from the Philadelphia General Hospital, indicating admission of petitioner on December 27, 1945 (only a few months after he was supposed to have been recovered) showing that he was in an acutely hallucinatory state following excessive indulgence in alcohol. The Philadelphia General Hospital record shows that petitioner himself believed that he had murderous impulses and an overweening desire to kill. Apparently owing to the Pennsylvania law restrict-

ing voluntary commitments to ten days, he was discharged by the hospital on January 4, 1946.

During the taking of the medical testimony, Mr. Levin took the position that the testimony raised an issue as to petitioner's insanity. The court, however, neither directed nor permitted the withdrawal of the plea of Guilty and continued on to take testimony in mitigation of penalty only, the degree of guilt having been adjudicated after hearing the Commonwealth's evidence only. During the hearing Mr. Levin again suggested to the Court that there should be a psychiatric examination and to receive a report of that type the proceeding was adjourned to November 5, 1948, the court stating that a psychiatrist would make an examination. Counsel had suggested the necessity of this months before (Par. 15, Petition to Withdraw as Counsel, Appendix p. 68).

The court then asked Dr. William Drayton, Jr., to examine petitioner and report to the court. Dr. Drayton testified that petitioner knew the difference between right and wrong at the time of the commission of the offense and that petitioner was properly oriented at the time of his examination, which was November 3rd and 4th, 1948. He did not testify anything as to Petitioner's mental condition on February 25, 1948, the date upon which the plea of Not Guilty was entered nor on September 21, 1948, which was the date on which he changed his plea to "Guilty" (Record of main case, p. 145a).

Furthermore, some of the testimony of Petitioner's witnesses well might have affected the decision of the court on the degree of the offense. Certainly the evidence of Petitioner himself stated by his counsel under direction of the court when the Petitioner was unable to proceed to give testimony, in effect denied the commission of a robbery. This had to be considered on the degree of the offense.

In fact the evidence with regard to Petitioner's mental history had obvious bearing on the issue of whether he could form the specific intent to rob or the specific intent to kill, one of which had to be found in order to support a finding of first degree murder. Together with the other evidence it warranted a finding that Petitioner's confession was unworthy of belief for the reason that Petitioner was mentally incompetent to give an accurate statement. Thus Mildred Wheeler testified as to petitioner's condition before the occurrence, that he appeared to be dopey and appeared to her as though he had been smoking marihauna (192a); his mother, Elsie Easton, testified that she had seen her son, the petitioner, in the same condition as he appeared in the courtroom on previous occasions (i.e. his "exhibitionism") (198a); that he had never spoken until he was five and that he was blind as a young baby but had his sight restored (198a); Margaret Smith, a sister of petitioner, testified that not only was he an habitual drunk but that he smoked reefers (marihuana (205a).

Even apart from this, however, it seems to petitioner to be pretty close to an absolute proposition of law that a court which in a capital case decides the issue before all the evidence is in, has violated due process of law. Even in a non-jury trial of a non-capital case it was so held. *Commonwealth* v. *Richman,* 132 Pa. Superior 529, 1 A. 2d 578. The presence in the record of Dr. Drayton's testimony with respect to petitioner's mental state does not cure this fatal defect. Dr. Drayton did not take the stand until November 5, 1948. (See Record of main case, p. 145a) Dr. Drayton's testimony was considered only on the question of which penalty to impose for murder of the first degree.

It requires no further citation of authority to establish the proposition that it was the bounden duty of the trial court to hear the evidence of both sides fully before coming to any final decision whatever on the question of degree of

guilt. The indictment states that both sides were heard on that day, but the Record shows this was not so and it is conceded in this proceeding that it is not so. The right to be heard in one's own defense is fundamental under "the law of the land" or due process of law since the same thought is expressed in each phrase. It was a well recognized principle of the common law that a court which decided a case without hearing both sides to the controversy did a great wrong, even if it could be said that the decision itself was right. In this case, as we have previously demonstrated, some of the testimony of petitioner's witnesses well might have affected the decision of the court on the degree of the offense. Certainly the evidence of defendant himself, given by his counsel, which in effect denied the commission of a robbery, had to be considered on the degree of the offense. With the robbery motive absent it would have been incumbent upon the court to have found that the murder was wilful, deliberate and premeditated else it could not have been said to have been murder in the first degree. Apparently no such finding was made but the adjudication of first degree murder was based only upon the finding that the killing occurred while defendant was perpetrating a robbery. Petitioner was therefore deprived of one of the most fundamental of all his rights—the right not to be condemned until his evidence was received and carefully considered.

It is of no consequence that after September 21, 1948, when the court foreclosed further inquiry as to the degree of the offense, Petitioner may not have in fact produced important evidence other than that noted above which would go to the degree. Indeed, it is not invalid to presume that no attempt was made to do so because of the very fact that the court had foreclosed such inquiry. In any event, the right of a defendant to have his evidence considered at all

"is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial". *Glasser* v. *United States*, 315 U. S. 60, 62 S. Ct. 457. The present case has nothing to do with the doctrine of harmless error or any mere question of error. The action of the Court denied a fundamental right and it thereby lost its jurisdiction to proceed to judgment particularly since that judgment is a sentence of death.

Petitioner Having Been Overreached at His Arraignment Was Again Overreached by the Court's Refusal to Judicially Decide His Claim of Mental Incompetency to Stand Trial.

Petitioner had been arraigned on February 25, 1948. Then, on or about March 16, 1948, Mr. Levin, who was still private counsel for Petitioner, filed a petition with the Court of Oyer and Terminer of Philadelphia County, asking for the appointment of a Commission to inquire into and report upon the mental condition of Petitioner (Appendix p. 66). This petition recited such a previous history of mental derangement as would warrant the appointment of such a Commission, not only under the Pennsylvania Mental Health Act of July 11, 1923, P. L. 998, 50 Purdon Statutes 1, *et seq.*, but also under the common law power of the court which has been held to remain unaffected by the statute. See *Commonwealth* v. *Barnes*, 280 Pa. 351, 124 A. 636. The Commonwealth filed no answer to this petition. Nevertheless it was dismissed (Paragraph 5, Petition for Writ of Habeas Corpus, R. 5).

Thereafter, Counsel unsuccessfully exhausted all available means of ascertaining the history of Petitioner's mental illness. The conspicuous lack of success was due only to Petitioner's poverty which deprived Petitioner of the effective assistance of counsel which he could have had

if he were able to pay for a full investigation (Paragraph 6, Petition for Writ of *Habeas Corpus*, R. 5).

Thereafter, counsel prepared a petition to withdraw as private counsel, and filed it with Judge Kun, to whom Petitioner's case had been assigned for trial. That petition set forth the mental history of Petitioner so far as counsel had been able to ascertain it and the inability of counsel to proceed with the proper preparation of the case by reason of Petitioner's poverty, and suggested that upon allowance of the petition to withdraw, counsel could then be appointed to represent Petitioner and that the desired information could possibly be obtained by such court-appointed counsel (Paragraph 7, Petition for Writ of *Habeas Corpus*, R. 5, paragraph 15 of Petition for Leave to Withdraw, Appendix 68).

Upon allowance of said petition Mr. Levin was appointed as counsel together with Harry Berkowitz, Esquire. They endeavored to obtain a psychiatric examination of Petitioner, to no avail, and, in consequence, they were unable properly to determine whether Petitioner was either sane at the time the offense was committed, or able to comprehend the charges against him, and able to cooperate in his defense on the several occasions his case was listed for trial (Paragraph 8, Petition for Writ of *Habeas Corpus*, R. 5).

The issue of mental incompetency in Bar of trial was fairly raised at every opportunity Petitioner had to raise it but it was never decided in any judicial proceeding whatever much less one which meets the test of due process. This was not a mere "suggestion" of insanity, it was no mere fishing expedition. It was supported by substantial facts.

It must be noted at the outset that this Petitioner had been adjudicated mentally incompetent by a court of competent jurisdiction of the State of New York (Paragraph

5 of Petition, R. 5). The adjudication of Judge Soble in the case of *People* v. *Smith,* Indictment No. 441, for the year 1945, is found in the record of the main case [1] (118a *et seq.*) and demonstrates that on the 18th day of June, 1945 Petitioner was adjudicated insane. He was then committed on June 19, 1945 to the Brooklyn State Hospital (110a) on the grounds that he was then presently *insane,* not imbecile *and* not capable of understanding the charge against him and of making his defense (83a). That finding resulted from a criminal charge against him in Kings County, New York, upon which the court requested an examination in accordance with the law of New York. At that time it was the medical opinion of the doctors that he did not know the difference between right and wrong (86a). Hence, even if tried, he could not have been convicted on the merits of the case. As a matter of fact, the record shows that in Kings County, New York, he had pleaded Guilty to the crime of petit larceny and the court directed the plea to be withdrawn and his plea of Not Guilty on the grounds of insanity substituted. His subsequent history after commitment to the Brooklyn State Hospital is found in the appendix to the record of the main case (122a, *et seq.*). Throughout this history it is demonstrated that his insight and judgment were lacking (126a-127a). It also indicates that he was the victim of hallucinations and delusions although he himself denied it. On September 21, 1945 he was presented for discharge to the staff meeting but discharge was deferred (130a). The conference among the doctors on September 21, 1945 shows a marked difference of opinion among them (139a). One of them even predicted that his lack of insight would undoubtedly lead to further difficulties (139a). Nevertheless, the Medical Director, Dr. Bellinger, on his

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[1] All references to pages coupled with "a" refer to the printed record in the main case.

own responsibility, despite the previous adjudication of insanity and without any evidence that he consulted any of the doctors who had previously on September 21, 1945 decided that Petitioner was unfit to be returned to society, and without even any administrative due process, decided *ex parte* that Petitioner had recovered and returned him to court. This hospital record demonstrates that this action and opinion were in contradiction to the staff record (130a *et seq.*). On October 11, 1945 Petitioner's condition was described by the Medical Director as being "recovered" although the diagnosis was "dementia praecox-catatonic type" (140a). When he was returned to the court, no judgment was entered but was instead suspended. No judicial or other hearing was held as to recovery and *no decree or adjudication of recovery was entered.* Cf. *Phyle* v. *Duffy,* 334 U. S. 431. The adjudication of insanity therefore remains, or at the very least is *prima facie* evidence of mental incompetency.

Within eleven weeks thereafter he was admitted to the Psycopathic Department of the Philadelphia General Hospital "in an acutely hallucinatory state following excessive indulgence in alcohol" (140a, 141a). The use of the word "following" is significant; it does not say "caused by".

With a history of such mental background it is obvious that this does not mean that he merely had the "rams". He himself "began to feel confused and was fearful that he would attack and kill anyone who got in his way" (141a). He was released, as the hospital record specifically shows, in an unsatisfactory condition, probably because Pennsylvania law does not permit retention of a person on voluntary commitment for more than ten days. It was stated (142a) "It is felt that electroencephalograms, along with a more detailed background social history, would have been helpful in establishing a more definite diagnosis."

There is no evidence of further treatment or commitment subsequent to that time. There is evidence that he drank steadily and was addicted to marihuana (192a).

Then Petitioner, on the 15th day of January, 1948, without the slightest provocation or justification, blew out the brains of an unoffending taxicab driver who was operating a moving taxicab in which Petitioner was a passenger.

Petitioner through his counsel thereafter did everything possible to call to the attention of the court his true condition. Surely it cannot be said on this record that Petitioner is held to have waived the right to have his sanity adjudicated. If nothing else did, his previous adjudication of insanity would clearly prevent such a waiver. When the case was listed before Judge Sloane on or about March 17, 1948, Counsel asked that Petitioner's sanity be adjudicated in accordance with law but this request was denied because Judge Sloane felt himself powerless to act unless the Superintendent of the prison in which Petitioner was confined chose to present such petition. See *Commonwealth* v. *Green,* 346 Pa. 172 f.n. 1 at p. 174; *Commonwealth* v. *Barnes,* 280 Pa. 351; *Commonwealth* v. *Dunn,* 47 D. & C. (Pa.) 685.

Indeed, such were the circumstances discussed with Judge Sloane that he felt moved to request the Superintendent of the Philadelphia County Prison, to cut the Gordian knot by presenting such a petition but the Superintendent purely ex parte, decided not to do so and the court held that it was powerless to act. The Supreme Court (R. 40) says that the Superintendent's refusal to petition for the appointment of a commission justified the Court in inferring that Petitioner was sane. This novel proposition must be incorrect for it would mean that even when a prisoner is committed to an insane asylum on the petition of a Prison Warden it may be inferred that the prisoner was sane up to the moment when the Warden filed his petition.

Not content with that result, Petitioner's counsel a few days thereafter, on March 19, 1948, presented a formal written petition reciting the essential facts as to Petitioner's prior adjudication of insanity, and formally prayed under oath as follows (Appendix 66):

> "Wherefore your Petitioner is of the belief and opinion the Defendant is mentally ill, of a nature and character, which can only be determined by competent psychiatrists, and your Petitioner prays your Honorable Court to appoint a commission to inquire into and report upon the facts in the case."

This petition was refused. Under the circumstances this made the later proceedings void. *Commonwealth* v. *Simanowicz,* 242 Pa. 402, 89 A. 562. And all the while this Petitioner, who had been adjudicated insane, which adjudication had never been overturned by any judicial action but only by the ex parte decision of the head of a mental institution (*Phyle* v. *Duffy, supra*) was still presumptively insane. It may be that his insanity was not of a permanent type and then again it may be that it was. Nobody took the trouble from the beginning of this case to its end to find out in any judicial proceeding which met the test of due process. The answer of the Supreme Court to our argument seems to be that a judicial determination of pre-trial insanity is in the wide discretion of the trial court, even if a petition which *prima facie* demonstrates insanity is presented. The Supreme Court holds (R. 39) that "this is particularly true when as here there was no such request made for any such hearing." If the petition under Section 308 of the Mental Health Act (Appendix 66) is not such a request, Petitioner does not know what is. Parenthetically we invite the attention of this Court to the strange reasoning of the Supreme Court of Pennsylvania which says at one point (R. 3) "neither is the court in such a situation bound to provide

defense counsel with psychiatrists to examine the prisoner" and yet emphasizes (R. 39) that no request for a phychiatrist was made. If, as the court said, Pennsylvania cannot grant such a request how is it of significance that none was made?

It is worthy of note that the Supreme Court at page 109, quotes with approval the following statement (R. 43, 44):

> "While an adjudication of insanity is admissible in evidence upon the trial of an issue of insanity at a time subsequent to such adjudication (State *v.* McMurry, 61 Kan. 87, 58 P. 961; Wheeler *v.* State, 34 Ohio St. 394, 32 Am. Rep. 372; Hempton *v.* State, 111 Wis. 127, 86 N.W. 596), it is not conclusive and may be rebutted by other evidence. Hale *v.* Harris, 169 Mich. 172, 134 N.W. 1111; Eagle *v.* Peterson, 136 Ark. 72, 206 S. W. 55, 57, 7 A.L.R. 553."

This is a recognition that a prior adjudication of insanity creates the rebuttal presumption of insanity. If this is true, Petitioner's plea of guilty should not have been accepted without having first received such evidence as would rebut the presumption of insanity. Here, Pennsylvania refused to determine the question at all but instead the plea was accepted, Petitioner was bound by it, evidence on the subject was heard by the court only after having arrived at a finding of first degree murder and then only on the restricted issue of the penalty to be imposed.

It seems to follow that if it is a violation of due process for Pennsylvania to try an insane man, then Pennsylvania must provide some fair proceeding for determining whether in fact a given man is sane or insane. Here, such a proceeding was denied to Petitioner.

As we have shown the law seems clear that where one is adjudicated generally insane, the presumption of insanity continues. The normal condition of a man is that he is presumed to be sane, but when he has been adjudicated

mentally incompetent, the presumption of sanity no longer prevails. In its place there arises a presumption of lack of mental capacity and the burden of proving mental capacity devolves upon him who asserts it. *Frame* v. *Hudspeth,* 109 F. 2d 356, 358; *Whitney* v. *Zerbst,* 10 Cir., 62 F. 2d 970; *Daly* v. *United States,* 7 Cir., 33 F. 2d 443; In re Kehler, 2 Cir., 159 F. 55; *State* v. *McMurry,* 61 Kan. 87, 58 P. 961; *Cubbison* v. *Cubbison,* 45 Ariz. 14, 40 P. 2d 86; *State* v. *Green,* 78 Utah 580, 6 P. 2d 177.

Once it is proved that the insanity is not of a permanent type then perhaps the question of sanity remains evenly balanced and there is no presumption at all. But unless and until there is some such showing, certainly there can no longer be any presumption of sanity. No matter what metaphysical views courts entertain with regard to the nature of "presumptions," no fair-minded person can assert that in such a case there is not or cannot be under the law a "doubt" of Petitioner's sanity. And where there is such doubt, a defendant has a constitutional right to have his mental competency to prepare for trial and to meet the charge on its merits decided by a judicial tribunal in accordance with the common concepts of fundamental fairness entertained by civilized people.

The Commonwealth would have it that it was a pure matter of favor that this Petitioner should be blessed with such a hearing as if it were the same question of insanity after conviction that confronted this Court in *Phyle* v. *Duffy* and *Solesbee* v. *Balkcom.* Petitioner does not so regard it. Had he not been committed on a charge of crime, on such a petition as his counsel had filed there can be little doubt that the court would have been obliged to inquire into his sanity. See Act of July 11, 1923, P.L. 998, Art. III, Section 304, 50 Purdon's Statutes (Supp.) 44 as amended (Printed in Appendix, p. 57). Does the mere charge of crime or his failure to be on bail create all the difference?

It must be remembered that he was still presumptively innocent and the law was obliged to treat him so. In Petitioner's submission the equal protection of the laws provision of the Fourteenth Amendment of the United States Constitution requires that persons who are merely charged with crime and committed in default of bail may not be subjected to the loss of other civil rights, status or property by means of procedures fundamentally different from those applicable to persons who although charged with crime are not so committed and also those who are not charged at all. Yet, although the averments and prayer of the petition filed by counsel imperatively called upon the court to adjudicate Petitioner's insanity, either under its common law powers recognized to be still in existence (*Commonwealth* v. *Barnes*, 280 Pa. 351) or under that part of Section 308 quoted above, the court felt itself obliged under the decisions of the Supreme Court of Pennsylvania to take the narrow view that it had no jurisdiction to settle the issue except with the permission of the Warden of the jail because of that part of Section 308 specifically dealing with persons in jail awaiting trial. That part reads as follows:

> "When any person detained in any prison, penitentiary, reformatory, or other penal or correctional institution, whether awaiting trial or undergoing sentence, or detained for any other reason (e. g. as a witness), shall, in the opinion of the superintendent, jail physician, warden, or other chief executive officer of the institution or other responsible person, be insane, or in such condition as to make it necessary that he be cared for in a hospital for mental diseases, the said superintendent, jail physician, warden or other chief responsible officer of the institution, or other person, shall immediately make application, upon a form prescribed by the department, to a law judge of the court having jurisdiction of the charge against said person, or under whose order he is detained, for commitment of said person to a proper hospital for mental diseases."

The Opinion of the Supreme Court in the present case now for the first time states the law to be that mandamus will lie to compel the Warden to act in a post-trial insanity case. That was not the holding of prior cases by which the Courts considered themselves bound. *Commonwealth* v. *Green*, 346 Pa. 172, 174 f. n. 1 29 A 2d 491 and *Commonwealth* v. *Barnes*, 280 Pa. 351, 124 A. 636, had held the Warden was an indispensable petitioner. The Attorney General of Pennsylvania so contended before the Supreme Court of Pennsylvania. Petitioner cannot now be held to have waived a right which under judicial decision was not open to him at the time. In any event, if the Court could have mandamused the Warden to file a petition it could likewise have acted on the petition which was filed or issued mandamus as an ancillary writ. Furthermore, the Supreme Court does not even now say that mandamus is available to compel the Warden to apply for mental examination prior to trial.

Is the procedure set up by Pennsylvania fair? And was this Petitioner treated in a fundamentally fair way? To appoint counsel, no matter how able, to represent this Petitioner in the situation in which he found himself was to give him a broken reed to lean upon. As this Court said in *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, the assistance of counsel means "effective assistance" and in capital cases it must be afforded at "every stage of the proceedings". Here, not only was no effective assistance afforded at his arraignment, when informed counsel, if present, could have called the attention of the judge to the Act of 1860 and when the issue could have been decided without coaxing the Warden to file a petition, but after counsel was appointed it rapidly became obvious that what Petitioner needed was not merely a lawyer but a doctor. We think it not too much to suggest that equal protection of the laws and due process of law means that no man, however humble,

may be denied medical assistance in a capital case where the failure of medical assistance may spell the difference between justice and injustice.

The Supreme Court says (R. 35) the plea was changed to guilty "After the matter was fully explained to the relator by his counsel, and his consent to the proposed course given". This seems to be an unrealistic disposition of the matter in view of the fact that there was then, as now, drawn into issue Petitioner's sanity. Having denied him any means whatever to prove his mental incapacity, it goes with ill grace for Pennsylvania to put him to death upon the basis of his "consent" to a plea of guilty.

The Supreme Court (R. 47), indicates that if the evidence raised a substantial doubt as to defendant's sanity a duty devolved upon counsel to move to withdraw the plea of guilty. It did raise a substantial doubt and it was not only the duty of the counsel to so move but it was the duty of the court and the prosecutor as well to act in the premises. Pennsylvania has always held that there is no warrant of attorney in a capital case. *Prine* v. *Commonwealth,* 18 Pa. 103; *Commonwealth ex rel. Milewski* v. *Ashe, Warden,* 363 Pa. 596.

Even after the guilty plea was entered, Petitioner was overreached on the question of his insanity. The Commonwealth has taken the position that the court did actually decide Petitioner's sanity in accordance with due process. Nothing could be further from the facts. This Court, in reading the record, will see that on September 21, 1948, this so-called plea of Guilty was accepted. The testimony of the Commonwealth was produced, a decision of murder in the first degree was arrived at and it was only thereafter that a psychiatrist was appointed. Every bit of testimony taken after September 21, 1948 was received only upon the Court's direct and unequivocal order that it would go only to the question of mitigation of penalty (76a). The trial court

directed Dr. Drayton to make an examination and he came in on November 5th to testify without having furnished any report either to counsel for the Commonwealth or counsel for the defense. After he had been heard, the Defendant himself testified. The cold record of this case demonstrates, even if Petitioner's arguments do not, that the Defendant was overreached on that day. The psychiatrist was invited up to a place in the jury box, counsel was charged with "pampering" the defendant and it was only with the utmost difficulty that any information was elicited from him, even though his life was at stake. His testimony consisted almost entirely of monosyllabic affirmative answers and when he appeared not to be able to answer he was charged with being "not cooperative" (177a); when it seemed that too much time was being taken up, counsel and court had a discussion. Patience certainly was not the order of the day.

Nobody can read this record without realizing that this man either was completely unable to aid in his own defense or deliberately chose not to do so. That is precisely the grave question that should have been answered in a judicial proceeding directed to that purpose. Instead, the defendant was merely charged with being an "exhibitionist" when hard-pressed. It was not until p. 184a that an attempt was made to get the facts of the case from him. Finally, when it must have been quite obvious to everybody that the witness could not or would not tell his story, he was directed to place his hands on the Bible while counsel told it for him! (185a)

Counsel then stated the facts and circumstances which he had wrested from the defendant with great difficulty in many interviews. The defendant, on the narration of his counsel, did not admit holding up the taxicab driver; did not admit telling the police that he had done so. With respect to his counsel's narration on 186a-188a, it shows that

the defendant had no mental capacity to remember or state what the occurrences were. Certainly if Petitioner's motive was robbery it was a most insane type of robbery. His willingness on the stand to answer "Yes" to any statement perhaps explains as well as anything else why he said in his confession that his motive was robbery. Who but a mentally unbalanced person would blow out the brains of the driver of a moving automoile, without warning, just to rob him and then make no attempt to do so? All the facts indicate, in the light of his background, that the killing was the result of a mental derangement coupled with homicidal urges as the records of the Philadelphia General Hospital would substantiate (141a).

Of Petitioner's conduct in court the trial court says this in its opinion (215a):

> "Defendant constantly kept his chin on his chest, twisted his mouth, wet his lips, clenched and unclenched his hands, and squirmed about on the witness chair. So pronounced was his conduct that the court requested Dr. Drayton to sit in front of the court room and observe the defendant."

In fact, the whole opinion of the trial court reinforces Petitioner's position that it was imperatively required that there be a judicial determination of his sanity after a real investigation, notice, hearing and opportunity for argument. The fact that Petitioner did not, except in times of stress, rub his nose, shake and otherwise act abnormal, does not put at rest the question of insanity. However, Petitioner did not expect the Supreme Court of Pennsylvania to re-try the case. The point is that all the evidence points to the fact that the pivotal question of mental capacity should have been decided.

It is idle for Respondents to suggest that the court did hear the question. The court accepted and acted upon Petitioner's plea of guilty, which presupposes his ability not

only to be arraigned and to stand trial but also to make a solemn confession of guilt in open court. How then can it be said that hearing Dr. Drayton afterward was the equivalent of a hearing on the question of Petitioner's mental competency to be tried? Dr. Drayton made two short examinations, made no written report either to the District Attorney or to defendant's counsel, testified in open court and was cross-examined. He was not even asked as to his opinion of Petitioner's sanity at the time he entered his plea of not guilty on February 25, 1948 or on September 21, 1948 when his plea was changed to guilty. In truth, it is correct to say, as did the Commonwealth in one portion of its brief in the Supreme Court of Pennsylvania, that the only examination made by Dr. Drayton was to "satisfy the conscience of the court". But although it may be sufficient as this Court held in *Solesbee* v. *Balkom* to leave a question of post trial insanity to the conscience of a court or the executive power, the conscience of the court is not the standard by which procedural trial and pre-trial safeguards are judged. It may be enough also in matters involving the exercise of pure discretion to leave the exercise of the duty to the conscience of the court but it is not enough to decide explicit constitutional rights on such a basis. Our state and federal constitutions formulated a definite system of rights and did not choose to put the protection of such rights only in the keeping of the "conscience of the court".

Petitioner conceded that as stated in *Commonwealth* v. *Scovern*, 292 Pa. 26, 140 A. 611, the judge is not compelled to grant an inquiry into the subject of sanity in all cases. But Petitioner contends that under the requirements of due process of law as well as common law the judge is bound to see to it that the question is adjudicated when a petition has been presented which prima facie shows in-

sanity. If such a petition raises a presumption of insanity, the trial cannot proceed until the presumption has been rebutted by a showing of sanity. On the other hand if the normal presumption of sanity continues despite the filing of such a petition, the prosecution should not be permitted to accept the benefit derived from the presumption of sanity while denying to an indigent defendant the right to a fair hearing which may enable him to demonstrate the falsity of the presumption. Anything less than fundamental fairness is not due process. It is fundamentally unfair to permit Pennsylvania to rely upon the presumption of sanity with knowledge that an indigent defendant with a mental history of insanity is prevented from a fair chance of rebutting it simply because he has no money.

Respectfully submitted,

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APPENDIX

A. Act of March 31, 1860, P. L. 427, Sections 66 and 67, 19 Purdon's Statutes 1351, 1352.

Section 66:

"In every case in which it shall be given in evidence upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offense, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offense, and to declare whether he was acquitted by them on the ground of such insanity; and if they shall so find and declare, the court before whom the trial is had shall order the cost of prosecution to be paid by the county, and shall have power to order him to be kept in strict custody, in such place and in such manner as to the said court shall seem fit, at the expense of the county in which the trial is had, so long as such person shall continue to be of unsound mind."

Section 67:

"The same proceedings may be had, if any person indicted for an offense shall, upon arraignment, be found to be a lunatic, by a jury lawfully impanelled for the purpose, or if, upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be a lunatic, the court shall direct such findings to be recorded, and may proceed as aforesaid."

B. Mental Health Act of July 11, 1923, P. L. 998, Art. III, Sections 304, 308, 50 P. S. (Supp.) 44, 48 as amended.

Section 304:

"An application may be made to a court of common pleas, or judge thereof, for an order for the admission of any person thought to be mentally ill to a hospital

for mental diseases; whereupon the court, or judge thereof, may, in its or his discretion, immediately appoint a commission to inquire into and report upon the facts in the case. Such commission shall be composed of three persons, two of whom shall be qualified physicians, and the other a lawyer. They shall in their inquisition, hear such evidence as may be offered, or as they may require, relating to the mental condition of the person whose admission to a hospital for mental disease is sought, as well as the statements of such person, or his counsel; and shall make a report, in writing, to the court, or judge thereof, setting forth whether or not they find that the person in question is in fact mentally ill and a proper subject for admission to a hospital for mental disease, and setting forth the facts on which their conclusion is based.

"If such commission finds that the person in question is mentally ill and is a proper subject for admission to a hospital for mental diseases, and the court, or judge thereof, shall approve the report of the said commission, said court or judge shall thereupon order the person to be admitted to and detained in the hospital named in the application, which order shall impose liability for the payment of the cost of care and maintenance of such patient on his estate, or on the persons liable under existing laws for his support, or on the Commonwealth. A certified copy of the order of the court or judge and copies of the application shall accompany the patient and be given to the superintendent in charge of the hospital in which the patient is ordered to be placed. The said application and order shall be kept on file in a special docket in the court. The court or judge may or may not, in its or his discretion, require the presence in court of the person thought to be mentally ill, and the procedure may be held in any place in the discretion of the court or judge.

If the person thought to be mentally ill shall refuse to submit himself to an examination by the aforesaid commission, the court, or judge thereof, may issue a

warrant for the bringing of said person before said commission for examination."

Section 308:

"When any person detained in any prison, penitentiary, reformatory, or other penal or correctional institution, whether awaiting trial or undergoing sentence, or detained for any other reason (e. g. as a witness), shall, in the opinion of the superintendent, jail physician, warden, or other chief executive officer of the institution or other responsible person, be insane, or in such condition as to make it necessary that he be cared for in a hospital for mental diseases, the said superintendent, jail physician, warden, or other chief responsible officer of the institution, or other person, shall immediately make application, upon a form prescribed by the department, to a law judge of the court having jurisdiction of the charge against said person, or under whose order he is detained, for commitment of said person to a proper hospital for mental diseases. The said judge shall forthwith order an inquiry by two qualified physicians, or by a commission as provided in section three hundred and four of this act, who shall immediately examine the said person and make written report of their or its findings to the said judge. If, in their opinion, the person so detained is insane, the physicians shall so state in a certificate conforming to the requirements of section three hundred and two, or the commission in a report conforming to the requirements of section three hundred and four of this act. They or it shall also report whether, in their or its opinion, such person is of criminal tendency. The said judge may, in his discretion, summon other witnesses and secure further evidence. If he is then satisfied that the person thought or alleged to be insane is in fact insane, he shall order the transfer of such person to a hospital for mental diseases. If the person is serving sentence, or if he is of criminal tendency, he shall be removed to a State hospital for insane criminals. In any other case, the judge shall commit him to some other hospital for mental diseases.

If the person found to be insane and transferred to a hospital is awaiting indictment or trial, or has been arraigned or is being tried, proceedings against him shall be stayed until his recovery. Upon his recovery, he shall be returned to the prison from which he was removed, for the disposition of the charges against him, upon proper order of the court. If he is a convict serving sentence, the time during which he is in the hospital shall be computed as part of the term for which he was sentenced.

The expense of examination, including the fees of physicians or commissioners, and all costs incident to the commitment and transfer of such person, and if such person is undergoing sentence, all costs of maintenance in the hospital previous to the expiration of such sentence, shall be paid by the county liable for the maintenance of the patient in the prison, penitentiary, reformatory, or other penal or correctional institution from which he was transferred, without recourse against any poor district.

If the sentence of a person committed to a hospital for mental diseases, under the provisions of this section, shall expire before his recovery, he may be transferred, by the authority of the department, to any other hospital for care until his recovery, when he shall be discharged as in the case of any noncriminal patient. If the person found to be insane and removed to a hospital is undergoing sentence and recovers before the expiration of his sentence, or is found, after observation for a sufficient time, not to be insane, the superintendent or chief officer of the hospital to which said person has been committed shall properly certify such fact to the court which has committed him, and he shall be returned, upon order of the said court, to the prison, penitentiary, reformatory, or other penal or correctional institution from which he was removed. The expense of removal shall be paid by the county liable for his maintenance in the prison, penitentiary, reformatory, or other penal or correctional institution from which he was removed, without recourse against any poor district.

When, on the production or appearance of any person charged with criminal offense, or on the production or appearance before the court of such a person under any other circumstances, it shall appear to the court that such person is insane, or in such condition as to make it necessary that he be observed or cared for in a hospital for mental diseases, proceedings for the commitment of such person to such a hospital shall be had, such as are provided for in section three hundred seven or section three hundred three of this act, upon application of some person to be designated by the court.

When any person charged with any crime or misdemeanor whatever shall be acquitted on the ground of insanity or having been insane at the time the offense was committed, the jury shall set out this fact in its verdict; and the court or judge before whom such person is tried may thereupon order such person to be committed to a hospital for mental diseases, in the manner provided in sections three hundred three, three hundred four, or three hundred seven of this Act."

C. Act of June 24, 1939, P. L. 872, Section 701, 18 Purdon's Statutes 4701:

"All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree. All other kinds of murder shall be murder in the second degree. The jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether the person is guilty of murder of the first or second degree. If such person is convicted by confession, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly.

Whoever is convicted of the crime of murder of the first degree is guilty of a felony and shall be sentenced

to suffer death in the manner provided by law, or to undergo imprisonment for life, at the discretion of the jury trying the case, which shall fix the penalty by its verdict. The court shall impose the sentence so fixed, as in other cases. In cases of pleas of guilty, the court, where it determines the crime to be murder of the first degree, shall, at its discretion, impose sentence of death or imprisonment for life. The clerk of the court wherein such conviction takes place shall, within ten (10) days after such sentence of death, transmit a full and complete record of the trial and conviction to the Governor.

Whoever is convicted of the crime of murder of the second degree is guilty of a felony, and shall, for the first offense, be sentenced to undergo imprisonment by separate or solitary confinement not exceeding twenty (20) years, or fined not exceeding ten thousand dollars, or both, and for the second offense, shall undergo imprisonment for the period of his natural life."

(Here follow 2 Photolithographs)

IN THE COURT OF QUARTER SESSIONS OF THE PEACE, OF THE COUNTY OF PHILADELPHIA

No. 384

February Sessions 1948, Sur Charge MURDER

COMMONWEALTH

vs.

JAMES SMITH

I CERTIFY the foregoing to be a true and correct copy of the whole Record, in the case above stated, as full, entire and complete as the same now remains of Record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this Fifth day of May A.D. one thousand nine hundred and fifty.

(s.) HAROLD WAGNER,
Pro Clerk.

[SEAL]

Copy of Docket Entries

IN THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY AND QUARTER SESSIONS OF THE PEACE, COUNTY OF PHILADELPHIA

February Sessions, 1948

No. 384 Murder

COMMONWEALTH

vs.

JAMES SMITH

February 25, 1948. Present Hon. Gerald F. Flood, prisoner present with his counsel, upon being arraigned pleads not guilty. District Attorney replies Sim et Issue. Same day, defendant, by his counsel, moves the Court for

a continuance of the trial. Same day, Continuance approved by the Court.

April 20, 1948. Present Hon. Joseph L. Kun, Affidavit of Destitute Circumstances and request to assign Counsel, filed. Same day, Harry M. Berkowitz and Herbert S. Levin. Esqs., are assigned to defend the within petitioner, with leave &c. Same day, the Defendant, by his counsel, moves the Court for continuance of the trial. Same day, continuance approved by the Court. Petition for certificate to secure attendance of witnesses in State of New York and Order and Certificate dated Sept. 21, 1948, signed by Judge Guerin, filed.

Sept. 21, 1948. Court Room 453, Present Charles L. Guerin, Hon. Joseph Sloane and Hon. Vincent A. Carroll. en banc: Same day, the defendant with his counsel, the defendant withdraws his plea of Not Guilty and enters a plea of Guilty Generally. Same day, after hearing testimony, both for the Commonwealth and the defendant, the defendant is adjudged Guilty of Murder of the First Degree.

Nov. 5, 1948. Additional testimony heard and held under advisement.

Feb. 4, 1949. Present Hon. Charles L. Guerin, Hon. Joseph Sloane and Hon. Vincent A. Carroll—In accordance with the above adjudication, the defendant is sentenced to Death in the manner provided by law. Same day, Present Hon. Charles L. Guerin—"And now, February 4, 1949, the sentence of the Court is that you, James Smith, be taken hence by the Sheriff of Philadelphia County to the jail of that County from whence you came, and from thence in due course to the Western Penitentiary in Centre County, Pennsylvania, and that you there suffer death during the week fixed by the Governor of the Commonwealth, in a building erected for the purpose on land owned by the Commonwealth, such punishment being inflicted by either the Warden of the Western Penitentiary or deputy Warden or by such person as the Warden shall designate, by causing to pass through your body a current of electricity of intensity sufficient to cause death and the application of such current to be continued until you are dead."

Mar. 4, 1949. Opin. filed.

Mar. 14, 1949. Affidavit of Counsel and Decree of Judge Guerin, dated March 10, 1949 and Affidavit of Personal and individual expenses advanced by Herbert Levin, Esq., filed.

Mar. 15, 1949. Notes of testimony, filed.

Mar. 15, 1949. Certiorari from the Supreme Court brought into office and filed. Returnable the Fourth Monday of April 1949.

Mar. 16, 1949. The sum of $286.10 was paid to Herbert Levin and $200.00 paid to Harry M. Berkowitz, Esqs., for professional services rendered in the within case.

May 4, 1949. Certificate of Trial Judge, filed.

May 19, 1949. Affidavit of counsel, filed.

July 6, 1949. Remittitur from the Supreme Court brought into office and filed. Judgment is affirmed.

July 18, 1949. Copy of whole record sent to Governor's office.

July 20, 1949. Acknowledgment and receipt of record filed.

May 5, 1950. Certificate of Order of Supreme Court filed. Same day, Order by Justice James B. Drew, Chief Justice of Penna. Supreme Court, brought into office and filed.

Copy of Docket Entries

IN THE COURT OF QUARTER SESSIONS OF THE PEACE, COUNTY OF PHILADELPHIA

MISCELLANEOUS COURT DOCKET

Feb. Sess. 1948

#384

COMMONWEALTH

vs.

JAMES SMITH

March 19, 1948. Petition under Mental Health Act of 1923 as amended for admission of Defendant to a Mental Hospital, filed.

Apr. 2, 1948. Petition dismissed. (Flood, J.)

IN THE COURT OF OYER AND TERMINER

February Sessions, 1948

Nos. 384-387

COMMONWEALTH OF PENNSYLVANIA

vs.

JAMES SMITH

PETITION UNDER MENTAL HEALTH ACT OF 1923, AS AMENDED FOR ADMISSION OF DEFENDANT TO A MENTAL HOSPITAL

TO THE TRIAL COURT:

The Petition of Herbert S. Levin, Esquire, respectfully represents that:

1. Above Defendant is presently confined to the Philadelphia County Prison, without bail, upon the charge of Murder in the First Degree, Robbery, Assault with Intent to Rob, etc., as of above term and number.

2. Your Petitioner was retained as counsel for Defendant by Defendant's mother on February 24, 1948.

3. Your Petitioner has received information which indicates that the Defendant may be and probably is now mentally ill, and that he was mentally ill at the time of the commission of the crimes of which he stands indicted.

4. During 1943 or 1944, while in the service of the U. S. Army, in India, Defendant was confined to a mental ward.

5. During May, 1945, Defendant was tried before the Kings County Court, in New York City, upon the charge of Larceny of an automobile and said Court thereupon appointed Doctors Gladys McDermaid and Fred Adams, qualified psychiatrists, to examine his mental condition; that after a thorough examination at the Kings County Hospital, said psychiatrists, on June 8, 1945, reported to said Court as follows:

"DIAGNOSIS:
Psychosis. Schizophrenia. Hebephrenic type.

CONCLUSION:

It is our opinion that James Smith is presently insane, not imbecile, and is not capable of understanding the charge against him, the proceedings against him, and of making his defense.

RECOMMENDATION:

It is recommended that this man be committed to a hospital for the insane such as Brooklyn State Hospital, for treatment of his mental condition. In view of his being convicted of the charge of Grand Larceny, he is being returned to court for disposition."

6. That pursuant to said report, Defendant was confined to the Brooklyn State Hospital, for treatment of his mental condition, and remained thereat until October or November, 1945.

7. That on December 27, 1945, said Defendant voluntarily entered the Philadelphia General Hospital and was confined in its mental ward until January 4, 1946; that the psychiatrists of this hospital diagnosed his condition as "Alcoholic Hallucinosis"; that he had a deep-seated personality disorder; that Defendant then suffered from hallucinations that he heard voices and felt the urge to kill anyone who interfered with him; that there was a suspicion of epilepsy of a convulsive nature, which would account for his criminal tendencies and destroy his ability to distinguish between right and wrong.

8. That Defendant presently has a belief that a "voodoo" practitioner is responsible for all his actions and feels unable to withstand the dictates of this voodoo upon him.

WHEREFORE, your Petitioner is of the belief and opinion that Defendant is mentally ill, of a nature and character which can only be determined by competent psychiatrists, and your Petitioner prays your Honorable Court to appoint a commission to inquire into and report upon the facts in the case.

HERBERT S. LEVIN.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

HERBERT S. LEVIN, being duly sworn according to law, deposes and says that he is the above-named Petitioner

and that the facts set forth therein are true and correct, to the best of his knowledge, information and belief.

HERBERT S. LEVIN.

Sworn to and subscribed before me this 19th day of March, A.D. 1948.

(s.) B.D.C.
Notary Public.

My Commission Expires Jan. 2, 1949.

Endorsement: In the Court of Oyer and Terminer. Feb. Sessions, 1948, Nos. 384-387—Commonwealth of Pennsylvania vs. James Smith—Petition Under Mental Health Act of 1923, as Amended, for Admission of Defendant to a *Mental Hospital*.—4-2-48 Petition Dismissed. Flood, J.—4/21/49 True Copy Colbert C. McClain Asst. D.A.—Herbert S. Levin, Esq., Suite 803, 1420 Walnut Street, Philadelphia 2, Pa.—Filed March 19, 1948.

IN THE COURT OF OYER AND TERMINER

February Sessions, 1948

Nos. 384-387

COMMONWEALTH OF PENNSYLVANIA

vs.

JAMES SMITH

PETITION TO WITHDRAW AS COUNSEL FOR ABOVE DEFENDANT

To the Honorable Joseph L. Kun, a Judge of Above Court:

The Petition of Herbert S. Levin, Esquire, respectfully represents as follows:

1. Above Defendant is presently confined at the Philadelphia County Prison, without bail, upon the charge of Murder in the First Degree, Robbery, Assault with Intent to Rob, etc., as of above term and number.

2. Your Petitioner was retained as counsel for Defendant by Defendant's mother on February 24, 1948.

3. Your Petitioner has received information which indicates that the Defendant may be and probably is now mentally ill, and that he was mentally ill at the time of the commission of the crimes of which he stands indicted.

4. During 1943 or 1944, while in the service of the United States Army in India, Defendant was confined to a mental ward.

5. During May, 1945, Defendant was tried before the Kings County Court, in New York City, upon the charge of Larceny of an automobile and said Court thereupon appointed Doctors Gladys McDermiad and Fred Adams, qualified psychiatrists, to examine his mental condition; that after a thorough examination at the Kings County Hospital, said psychiatrists, on June 8, 1945, reported to said Court as follows:

> "*Diagnosis:*
>
> Psychosis. Schizophrenia. Hebephrenic type.
>
> *Conclusion:*
>
> It is our opinion that James Smith is presently insane, not imbecile, and is not capable of understanding the charge against him, the proceedings against him, and of making his defense.
>
> *Recommendation:*
>
> It is recommended that this man be committed to a hospital for the insane such as Brooklyn State Hospital, for treatment of his mental condition. In view of his being convicted of the charge of Grand Larceny, he is being returned to court for disposition."

6. That pursuant to said report, Defendant was confined to the Brooklyn State Hospital, for treatment of his mental condition, and remained thereat until October or November, 1945.

7. That on December 27, 1945, said Defendant voluntarily entered the Philadelphia General Hospital and was confined in its mental ward until January 4, 1946; that the psychiatrists of this hospital diagnosed his condition as "Alcoholic Hallucinosis"; that he had a deep-seated personality disorder; that Defendant then suffered from hallucinations that he heard voices and felt the urge to kill anyone who interfered with him; that there was a suspicion of epilepsy of a convulsive nature, which would account for his criminal tendencies and destroy his ability to distinguish between right and wrong.

8. Above case has been listed for trial in Room 453, City Hall, on Tuesday, April 20, 1948, at 10:00 o'clock A. M., before your Honorable Court. In view of that fact, this Petition is addressed to your Honorable Court as the assigned trial court.

9. Your Petitioner desires to withdraw as counsel for Defendant, for the reason that the family of the Defendant is indigent, and completely without means to provide counsel with sufficient moneys to cover the expenses necessary to adequately prepare the defense of said Defendant, as will more particularly be set forth hereinafter.

10. It is material to the defense that the record of the Brooklyn State Hospital be obtained, and for that purpose, present counsel wrote said Hospital and in turn was referred by them to the Attorney General of New York.

11. On March 2, 1948, Honorable Isadore Siegel, Assistant Attorney General of New York in charge of Mental Hygiene Division, wrote counsel as follows:

> "Responding to your letter of Feb. 28, 1948, this is to inform you that Section 34, subdivision 9 of the Mental Hygiene Law of the State of New York provides as follows:
>
> 'Such record (hospital record) shall be accessible only to the Director and such officers or subordinates of the institution as he may designate and to the Commissioner and his representatives, except on the consent of the Commissioner, or an order of a Judge of a Court of Record.'

As you undoubtedly know, hospital records are privileged and confidential.

It is suggested that you have some New York lawyer apply to the Supreme Court for an order authorizing a psychiatrist to examine the record of this patient so that such psychiatrist give proper testimony if necessary in connection with the murder trial."

The original letter is attached hereto and made a part hereof.

12. Pursuant thereto, and because of the absence of necessary funds for engaging correspondent counsel, Petitioner wrote to Honorable Thomas E. Dewey, Governor of the State of New York, requesting special permission to obtain a copy of said hospital's records without the necessity of engaging counsel.

13. In reply, Petitioner received a letter from the Deputy Commissioner of the Department of Mental Hygiene, State of New York, stating that the suggestion of Attorney General Siegel should be obeyed. This letter is likewise attached hereto and made a part hereof.

14. In an effort to obtain the complete medical history of this Defendant, Petitioner filed a petition under the Mental Health Act of 1923 for the admission of the Defendant to a mental hospital. Said petition was filed on or about March 19, 1948, before the Honorable Gerald S. Flood and was denied by him on April 5, 1948.

15. Your Petitioner suggests that it would be to the best interests of the Commonwealth and the Defendant in securing all material, pertinent information relating to the mental status of the Defendant not only at the time of the commission of the crime but presently.

16. Your Petitioner suggests that justice will best be served by his withdrawal from the case, so that the Commonwealth, upon the request of the Defendant, may appoint competent counsel to represent him, thereby enabling them to obtain such information.

WHEREFORE, your Petitioner prays your Honorable Court to permit his withdrawal as counsel for the Defendant.

HERBERT S. LEVIN.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

HERBERT S. LEVIN, being duly sworn according to law, deposes and says that he is the Petitioner named in the foregoing Petition and that the facts set forth therein are true and correct.

HERBERT S. LEVIN.

Sworn to and subscribed before me this 7th day of April, A. D., 1948.

(S.) B. D. L.,
Notary Public.

My Commission expires Jan. 2, 1949.

(Seal) Department of Law, State Office Building
80 Centre Street
New York 13, N.Y.
Telephone: Cortlandt 7-9800

Nathaniel L. Goldstein,
Attorney General.

John P. Powers,
Assistant Attorney General
In Charge of Litigation Bureau.
1076
Isadore Siegel,
Assistant Attorney General
In charge of
Mental Hygiene Division.

March 2, 1948.

Re: James Smith,
Brooklyn State Hospital;
Herbert S. Levin, Esq.,
1420 Walnut Street,
Philadelphia 2, Pa.

DEAR SIR:

Responding to your letter of Feb. 28, 1948, this is to inform you that Section 34, subdivision 9 of the Mental Hygiene Law of the State of New York provides as follows:

> "Such record (hospital record) shall be accessible only to the Director and such officers or subordinates of the institution as he may designate and to the Commissioner and his representatives, except on the consent of the Commissioner, or an order of a Judge of a Court of Record."

As you undoubtedly know, hospital records are privileged and confidential.

It is suggested that you have some New York lawyer apply to the Supreme Court for an order authorizing a psychiatrist to examine the record of this patient so that such psychiatrist give proper testimony if necessary in connection with the murder trial.

Morris Sherman referred to in your letter is listed in the New York telephone book as being located at 62 William St., New York City. A second Morris Sherman is listed

WHEREFORE, your Petitioner prays your Honorable Court to permit his withdrawal as counsel for the Defendant.

HERBERT S. LEVIN.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

HERBERT S. LEVIN, being duly sworn according to law, deposes and says that he is the Petitioner named in the foregoing Petition and that the facts set forth therein are true and correct.

HERBERT S. LEVIN.

Sworn to and subscribed before me this 7th day of April, A. D., 1948.

(S.) B. D. L.,
Notary Public.

My Commission expires Jan. 2, 1949.

(Seal) Department of Law, State Office Building
80 Centre Street
New York 13, N.Y.
Telephone: Cortlandt 7-9800

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Mental Hygiene Division.

March 2, 1948.

Re: James Smith,
Brooklyn State Hospital;
Herbert S. Levin, Esq.,
1420 Walnut Street,
Philadelphia 2, Pa.

DEAR SIR:

Responding to your letter of Feb. 28, 1948, this is to inform you that Section 34, subdivision 9 of the Mental Hygiene Law of the State of New York provides as follows:

> "Such record (hospital record) shall be accessible only to the Director and such officers or subordinates of the institution as he may designate and to the Commissioner and his representatives, except on the consent of the Commissioner, or an order of a Judge of a Court of Record."

As you undoubtedly know, hospital records are privileged and confidential.

It is suggested that you have some New York lawyer apply to the Supreme Court for an order authorizing a psychiatrist to examine the record of this patient so that such psychiatrist give proper testimony if necessary in connection with the murder trial.

Morris Sherman referred to in your letter is listed in the New York telephone book as being located at 62 William St., New York City. A second Morris Sherman is listed

at 72 Wall St., New York City. The latter is identified as a certified public accountant, and the former as a lawyer.

Very truly yours,

NATHANIEL L. GOLDSTEIN,
Attorney General;
By (s.) ISADORE SIEGEL,
Assistant Attorney General.

IS:AMB

Form 26-D. M. H.
Frederick MacCurdy, M. D.
Commissioner

(Seal) State of New York, Department of Mental Hygiene
State Office Building, Albany

March 26, 1948.

Herbert S. Levin, Esq.,
803 Guarantee Trust Bldg.,
1420 Walnut St.,
Philadelphia, Pa.

DEAR MR. LEVIN:

Your letter addressed to Governor Dewey regarding your request to obtain the record of James Smith, formerly a patient in the Brooklyn State Hospital, has been referred to this Department.

In my experience, Mr. Siegel's suggestion to you is a practical one to obtain the data which will be of legal value for the protection of your client. I am sure that the Attorney-General will do everything reasonable to help you. As the Department of Law is our legal representative, I am referring your communication to the Department for further consideration and appropriate reply.

Anticipating that some practical solution will be found, I am

Very truly yours,

(s.) ARTHUR W. PENSE, M. D.,
Deputy Commissioner.

Endorsement: In the Court of Oyer and Terminer, February Sessions, 1948, Nos. 384 to 387—Commonwealth

of Pennsylvania vs. James Smith—Petition to Withdraw as Counsel for above Defendant—The original petition having been lost, this copy may be filed as the one granted on or about April 15, 1948. Kun, J.—Herbert S. Levin, Esq., Suite 803, 1420 Walnut Street, Philadelphia 2, Pa.

No. 302 Miscellaneous Docket No. 9

DOCKET ENTRIES SUBSEQUENT TO MARCH 18, 1950

COMMONWEALTH OF PENNSYLVANIA, EX REL. JAMES SMITH

vs.

STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, AND DR. FREDERICK S. BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON

#May 1, 1950. Petition for order directed to Clerk of Court of Quarter Sessions, or Oyer and Terminer and General Jail Delivery, directing him to send certain papers to Supreme Court, filed.

THOMAS D. MCBRIDE.

##May 1, 1950 Petition for stay of execution filed.

THOMAS D. MCBRIDE.

#This 5th day of May, 1950, the prayer of the attached petition is granted and the Clerk of the Court of Oyer and Terminer and General Jail Delivery of Philadelphia County is directed to send to this Court the original bill of indictment of James Smith for murder in the Court of Oyer and Terminer, Philadelphia County as of February Sessions 1948, Number 384; certified copy of docket entries of the Court of Oyer and Terminer, Philadelphia County, February Sessions, 1948, Number 384; Petition filed on March 19, 1948, with the Court of Quarter Sessions of Philadelphia County (Miscellaneous Court) asking for the appointment of a commission to inquire into and report upon the mental condition of Relator; and petition of Herbert S. Levin, Esquire, to withdraw as counsel for Relator, filed on or about April 20, 1948.

By the Court,

JAMES B. DREW,
Chief Justice.

May 5, 1950 Certificate of order exit and sent to Clerk of the Court of Oyer and Terminer and General Jail Delivery, Philadelphia County.

##This 5th day of May, 1950, the prayer of the attached petition is granted and the execution of the death penalty upon James Smith, Relator in the above case, is stayed until the petition for writ of certiorari to review the decision of this Court denying Relator a writ of habeas corpus has been finally acted upon and disposed of by the Supreme Court of the United States.

By the Court,

JAMES B. DREW,
Chief Justice.

Docket Entries continued

COMMONWEALTH OF PENNSYLVANIA, EX REL. JAMES SMITH

vs.

STANLEY P. ASHE, WARDEN ET AL.

May 5, 1950. Certificates of order exit and sent to:

Hon. James H. Duff,
Governor of Pennsylvania,
Harrisburg, Pa.

Clerk of the Court of Oyer and Terminer and General Jail Delivery, Philadelphia County.

May 5, 1950, Acknowledgment of Orders received and filed.

May 5, 1950, Praecipe for certification of additional papers for the Supreme Court of the United States, filed.

THOMAS D. MCBRIDE.

May 6, 1950, the following papers received from the Clerk of the Court of Oyer & Terminer of Philadelphia County:

Bill of Indictment No. 384 February Sessions, 1948.
Certified copy of Docket Entries of the Court of Oyer and Terminer, Philadelphia County.

Petition filed March 19, 1948, with Court of Oyer and Terminer Philadelphia County (Miscellaneous Court) for appointment of a commission to inquire into and report on mental condition of Relator.

Petition of Herbert S. Levin, Esquire, to withdraw as counsel for relator, filed on or about April 20, 1948.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Miscellaneous Docket No. 9

No. 302

COMMONWEALTH, EX REL. JAMES SMITH

vs.

STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, AND DR. FREDERICK S. BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON

ORDER

This 5th day of May, 1950, the prayer of the attached petition is granted and the Clerk of the Court of Oyer and Terminer and General Jail Delivery of Philadelphia County is directed to send to this Court the original bill of indictment of James Smith for murder in the Court of Oyer and Terminer, Philadelphia County as of February Sessions 1948, Number 384; certified copy of docket entries of the Court of Oyer and Terminer, Philadelphia County, February Sessions 1948, Number 384: petition filed on March 19, 1948, with the Court of Quarter Sessions of Philadelphia County (Miscellaneous Court) asking for the appointment of a commission to inquire into and report upon the mental condition of Relator; and petition of Herbert S. Levin, Esquire, to withdraw as counsel for Relator, filed on or about April 20, 1948.

By the Court.

(s.) JAMES B. DREW,
Chief Justice.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

Miscellaneous Docket No. 9

No. 302

COMMONWEALTH, EX REL. JAMES SMITH

vs.

STANLEY P. ASHE, WARDEN, WESTERN STATE PENITENTIARY, AND DR. FREDERICK S. BALDI, SUPERINTENDENT, PHILADELPHIA COUNTY PRISON

PETITION FOR ORDER DIRECTED TO THE CLERK OF THE COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY OF PHILADELPHIA COUNTY

To the Honorable Chief Justice and Associate Judges of the Supreme Court of Pennsylvania:

The petition of Thomas D. McBride, Esquire, respectfully represents:

1. That he is counsel for James Smith, above named Relator, who is under sentence of death and awaiting execution for murder of the first degree.

2. That a petition for writ of habeas corpus was filed on behalf of James Smith and was denied by this Honorable Court. 364 Pa. 93.

3. That your petitioner is preparing a petition for writ of certiorari to be filed in the Supreme Court of the United States to the end that that Court may review the decision of this Court denying the writ of habeas corpus.

4. That the petition for a writ of habeas corpus referred to the following parts of the original records upon which this court affirmed Relator's conviction of murder of the first degree (Commonwealth *v.* James Smith, 362 Pa. 222), and this Court referred to them in its Opinion:

(a) Original bill of indictment of James Smith for murder in the Court of Oyer and Terminer and General

Jail Delivery of Philadelphia County as of February Sessions 1948, Number 384.

(b) Certified copy of docket entries of the Court of Oyer and Terminer and General Jail Delivery, Philadelphia County, February Sessions 1948, Number 384.

(c) Petition filed on March 19, 1948 with the Court of Quarter Sessions of Philadelphia County (Miscellaneous Court) asking for the appointment of a commission to inquire into and report upon the mental condition of Relator.

(d) Petition of Herbert S. Levin, Esquire, to withdraw as counsel for Relator.

5. That petitioner is preparing a petition to the Supreme Court of the United States asking that Court for a writ of certiorari to review the action of this Court denying Relator a writ of habeas corpus.

6. That Relator's case cannot properly be placed before the Supreme Court of the United States for consideration of the petition for a writ of certiorari unless a true copy of the above papers is certified by this Court to the Supreme Court of the United States.

7. That the above mentioned papers are in the custody of the Clerk of the Court of Oyer and Terminer and General Jail Delivery of Philadelphia County.

WHEREFORE, your petitioner prays that this Court issue an order directed to the Clerk of the Court of Oyer and Terminer and General Jail Delivery of Philadelphia County directing him to send to this Court the above mentioned papers.

And your petitioner will ever pray.

(s.) THOMAS D. McBRIDE,
Petitioner.

COMMONWEALTH OF PENNSYLVANIA:
County of Philadelphia. ss:

THOMAS D. McBRIDE, being duly sworn according to law, deposes and says that he is the petitioner above named,